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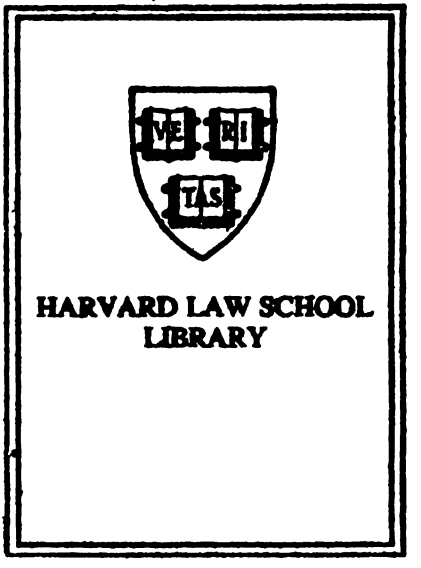

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MICHIGAN REPORTS.

REPORTS OF CASES

HEARD AND DECIDED IN

The Supreme Court of Michigan

FROM

JANUARY 4 TO OCTOBER 13, 1860.

THOMAS M. COOLEY, REPORTER.

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Supreme Court of Michigan.

GEORGE MARTIN, Chief Justice.

RANDOLPH MANNING,
ISAAC P. CHRISTIANCY,
JAMES V. CAMPBELL,
} Associate Justices.

JACOB M. HOWARD, Attorney General.

Judges of Circuit Courts, &c.

First Circuit.
EDWARD H. C. WILSON.

Second Circuit.
NATHANIEL BACON.

Third Circuit.
BENJAMIN F. H. WITHERELL.

Fourth Circuit.
EDWIN LAWRENCE.

Fifth Circuit.
BENJAMIN F. GRAVES.

Sixth Circuit.
SANFORD M. GREEN.

Seventh Circuit.
JOSIAH TURNER.

Eighth Circuit.
LOUIS S. LOVELL.

Ninth Circuit.
FLAVIUS J. LITTLEJOHN.

Tenth Circuit.
WILBUR F. WOODWORTH.

DANIEL GOODWIN, District Judge of the Upper Peninsula.

HENRY A. MORROW, Recorder of Detroit.

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Amendment to Supreme Court Rule.

Rule 31 was amended April 20, 1860, by striking out the words "or so much as is material for a full understanding of the case," where they occur in lines seven and eight as printed, and inserting instead thereof "except the formal parts."

Amendments to Circuit Court Rules.

Rule 35 was amended April 20, 1860, by inserting after the word "answered" in the sixth line as printed, the words "but if the pleading be such as does not require to be answered, it can be amended under this rule only within ten days after filing the same."

The following new rules were adopted at the same time.

Rule 96. If any Sheriff or Coroner shall fail to return any process to him directed and delivered, on or before the return day therein specified, the party in whose behalf the same was issued, may cause a rule to be entered in the Book of Common Rules, requiring such officer to return such process within twenty days after service of notice of such rule; and if such process be not returned within the time specified in such rule, on filing with the Clerk an affidavit of the service of such notice, and of the delivery of the process to such officer to be served, the default of such officer in not making such return may be en

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tered, and thereupon an attachment may be issued, of course, against such Sheriff or Coroner, to compel such return.

RULE 97. The party having the affirmative of the issue, and bringing the cause to trial or hearing, shall prepare an issue-roll, containing a copy of the pleadings, and any notice of set-off or of special matter of defense which may have been given under the general issue, and such roll shall be used on the trial or hearing instead of the original files in the cause; and such original files shall not be removed from the Clerk's office to be used on such trial or hearing, without the special order of the Court.

RULE 98. If the party required to prepare such roll, shall recover costs in the suit, he shall be entitled to tax as a part thereof ten cents for each folio of one hundred words contained therein.

The following was adopted October 13, 1860.

RULE 99. The plaintiff in any action of covenant, debt or assumpsit, on money bonds, promissory notes or bills of exchange, commenced after November 1, 1860, at issue as well as on default, may have the same called out of its order on the calendar, and an inquest taken and judgment rendered thereon at the opening of the Court on any day of term after the first, in all cases where parties are sued in their individual capacity, unless the defendant or his attorney shall before the first day of term have filed an affidavit of merits and served a copy thereof on plaintiff's attorney; provided the intention of the plaintiff to take an inquest under this rule be expressed in the notice of trial.

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JANUARY TERM, 1860, AT LANSING.

Julia Beaubien and others v. Mary A. Cicotte and others.

The averments on the part of the propounder of a will should include everything necessary to constitute it a valid will under the statute, so that a verdict finding the truth of those averments, without more, would bring the will within all the express requirements of the statute. He must, therefore, aver the soundness of mind of the testator at the time of the execution of the will, and the burden of proof is upon him to prove that fact.

But upon questions of evidence, growing out of any presumption of sanity affecting the burden of proof in particular cases, the Court express no opinion.

Heard December 8d, 1859. Decided January 4th.

Case reserved from the Wayne Circuit.

Joseph A. Moross and others, claiming under an instrument purporting to be the last will and testament of Antoine Beaubien, presented the same to the Probate Court for the county of Wayne, for probate and allowance, but on hearing, the same was disallowed. From the order of disallowance they appealed to the Circuit Court, and an issue being there directed to be made up, propounded in writing the averment that the instrument presented "was signed by the said Antoine Beaubien, on the day when it bears date, to wit, the 12th day of January, in the year eighteen hundred and fifty-eight, as and for his last will and testament, and was then and there attested and subscribed in his presence by at least two competent witnesses, and that at the time of the execution thereof the said Antoine Beaubien was of full age."

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The contestants demurred, assigning for cause that "there is no averment that at the time of the signing of the said instrument, as and for his last will and testament, the said Antoine Beaubien was of sound mind."

On the hearing upon this demurrer, the Circuit Judge reserved for the opinion of this court the question,

Is the burden upon the appellants and propounders of the will, in this case, to aver and prove that, at the time of the execution of said will, the said Antoine Beaubien was of sound mind?

J. M. Howard, for appellant, cited:

2 *Greenl. Ev.* §689; 1 *Ibid.* §77; *Note to Phelps v. Hartwell*, 1 *Mass.* 71; *Buckminster v. Perry*, 4 *Mass.* 593; *Brooks v. Barrett*, 7 *Pick.* 94; *Atty. Genl. v. Pranther*, 3 *Bro. Ch.* 441; *Hix v. Whittemore*, 4 *Metc.* 546; *Stewart's Ex. v. Lispenard*, 26 *Wend.* 255, 301, 303.

S. T. Douglass, for respondants, cited:

Barry v. Butlin, 1 *Curteis* 638; *Saukey v. Lilley*, *Ibid.* 397; *Ibid.* 350; *Baker v. Batt*, 2 *Moore*, 317; *Browning v. Budd*, 6 *Moore* 430; *Parke v. Ollatt*, 2 *Phill.* 323; *Harris v. Ingledew*, 3 *P. Wms.* 93; *Wallis v. Hodgeson*, 2 *Atk.* 56; *Crowninshield v. Crowninshield*, 2 *Gray* 524; *Baxter v. Abbott*, 7 *Gray* 71; 32 *Me.* 441; 34 *Me.* 162; 6 6 *Ga.* 324; 10 *Ibid.* 324; 14 *Ibid.* 395, *Comstock v. Hadlyme*, 8 *Conn.* 254; 13 *Ill.* 15; *Brydges v. King*, 3 *Eng. Ec. R.* 109; *Mynn v. Robinson*, 4 *Ibid.* 72, *Marsh v. Tyrrill*, *Ibid.* 33, 51; *Ingram v. Wyatt*, 3 *Ibid.* 167; *Berger v. Hill*, 1 *Bradf.* 360; *Weir v. Fitzgerald*, 2 *Ibid.* 42; *Ibid.* 261, *Mowry v. Silber*, *Ibid.* 134; *McGuire v. Keen*, *Ibid.* 244; *Comp. Laws*, § 2825, 2828, 2829, 2832.

CHRISTIANCY J.:

The only question properly reserved for our opinion, in this case, is that raised by the demurrer.

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The averments on the part of the propounders of the will, for the purpose of forming an issue upon its validity, should, we think, include every thing necessary to constitute it a valid will under the statute, so that a verdict finding the truth of all those averments, without more, would bring the instrument within all the express requirements of the statute.

The law in case of intestacy, that is, in the absence of a will which is valid under the statute, fixes the descent and distribution of the property of deceased persons. Under certain conditions which the statute has prescribed, and in no other event, it allows the owner to control the disposition of his property after his death, by means of a will. The power to make wills, the formalities with which they shall be executed, and their efficiency, depend upon the statute.

The only persons recognized by the statute as competent to make a valid will, are persons "of full age and sound mind." Soundness of mind, then, in the testator, at the time of making the will, is one of the statute requisites to its validity.

But, it is said, the law presumes this soundness of mind till the contrary be proved: that soundness of mind is also necessary to the validity of deeds, contracts, and other writings besides wills, and yet that it is never necessary, in pleading such deeds, contracts and other writings, to aver soundness of mind in the parties executing them. This is certainly true in the case of deeds and all ordinary contracts and writings *inter vivos*, and yet soundness of mind is necessary to their validity. But in these cases the law only *implies* the necessity of the fact, without *expressly requiring* it; and where its necessity rests only upon *implication*, the presumption of sanity which the law raises without proof, is sufficient to satisfy the implication of its necessity, without *averment*.

But where the Legislature have not been satisfied to

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leave the necessity of the existence of the fact to implication, but have thought it necessary to require its existence by express enactment, upon what principle can a pleading, which sets up a right under the statute, leave the same fact to implication which the Legislature were unwilling to leave to the same implication? Where the statute has *expressly* required the existence of the fact, the pleader, we think, must expressly aver it.

We will not say here that there can be *no presumption* under our statute in favor of soundness of mind in the case of a will. The case, as presented by the demurrer, does not call for a decision upon a question as broad as this. But it is manifest from the nature of things, and from common observation and experience, that this presumption is not so strong in the case of wills generally, without special reference to the facts of any particular case, as in the case of deeds and ordinary contracts. Instruments of the latter description are generally executed in the common course of business, while the parties are in full possession of their ordinary physical and mental powers. Wills, on the contrary, are much more frequently, if not in the majority of cases, executed when the testator is *in extremis*, when the physical powers, at least, are greatly impaired, and the mental faculties much more likely to be weakened or obscured.

We think the statute intended to recognize this obvious difference between the two classes of cases when, in defining the persons competent to make a will, it expressly requires soundness of mind in the testator, while it is silent as to that requisite in the case of deeds and other contracts. We can see no other sufficient reason for expressly requiring it in the one case, and not in the other.

But all wills are not made when the testator is *in extremis*. They are sometimes executed long before his death, and while in full physical health. In such cases, doubtless, the reasons are just as strong for presuming soundness of

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mind, as in the case of deeds or contracts. And while we do not deny, as an abstract question, that there may be, in cases of wills, without reference to the facts of any particular case, a presumption of soundness of mind in the testator; yet, as matter of fact, the force of the presumption must depend much upon the circumstances of each particular case as disclosed by the evidence; and when the question arises only upon a pleading like the present, which discloses none of the circumstances of the case, and is to be decided in the abstract, as a question of pleading under the statute, the presumption, if there be any, is not strong enough, we think, to dispense with the averment of the fact.

We are therefore of opinion the demurrer is well taken; but the parties propounding the will should, of course, be allowed to amend.

It follows from the view we have taken of the pleading, that the burden of proof, as to soundness of mind, rests upon the parties seeking probate of the will. This, we think, is also to be inferred from the eighteenth and nineteenth sections of chapter 92 Compiled Laws, in reference to the proof of wills by one subscribing witness only, when not contested, as well as where all the witnesses reside out of the state; in both of which cases the statute assumes the necessity of such proof.

But, beyond this, upon any particular question of evidence growing out of the presumption in question, and the burden of proof, we express no opinion, as we could only do so upon hypothetical cases, which might have no bearing upon the case as presented on the trial, and which have not been, and could not be argued in the case as now presented.

Whether, in the absence of all evidence upon the point, the subscribing witness being ignorant respecting it, and nothing appearing to throw doubt upon the sanity of the testator, the legal presumption would be sufficient to sustain the burden of proof till overcome by opposing evidence:

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Whether, if the evidence were equally balanced, this presumption should turn the scale in favor of sanity, or whether there must be a preponderance of evidence in its favor independent of the presumption: Whether upon the formal proof, by the subscribing witnesses, of its execution, and the soundness of mind of the testator, the burden of proof changes to the contestants, to prove unsoundness of mind; and which party is entitled to open and close, upon the whole case, or certain branches of the case: — All these are questions upon which there is, perhaps, as painful a conflict of judicial decisions as upon any other questions to be found in the books. — See 1 *Jarm. on Wills*, (3 *Am. Ed.*) *pp.* 74, 75, and notes, where the various cases are collected: and see *Baxter v. Abbott*, 7 *Gray* 71, *and Crowninshield v. Crowninshield*, 2 *Gray* 524.

Many of these questions might depend much upon the precise nature of the issue or issues formed upon the pleadings, and much also, upon the circumstances of each particular case, as disclosed by the evidence. The attempt to lay down rules *a priori*, upon questions of so much difficulty, would be dangerous in the extreme. We therefore refrain from the intimation of any opinion upon them, until a case shall be presented which may render it necessary.

The other Justices concurred.

The People on the relation of DeWitt C. Holbrook v. The Treasurer of Detroit.

The owner of an undivided interest in lands in the City of Detroit, may redeem such interest from a sale made of the whole land for taxes assessed thereon for city purposes, since the Charter of 1857, by paying a proportionate amount of the whole tax.

Heard December 9th, 1859. Decided January 5th.

Motion for a mandamus.

The relator being the owner of an undivided interest

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in a lot in the city of Detroit, which had been sold for city taxes assessed thereon for the year 1857, applied to the city treasurer to redeem such undivided interest from the sale, and claimed a right to do so on payment of a proportionate amount of the tax assessed upon the whole lot. The treasurer refused to receive a portion only of the tax, and denied the right to redeem any interest in the land except on payment of the whole tax. The relator thereupon applied for a mandamus.

D. C. Holbrook, and *S. T. Douglass*, for relator.

J. L. Chipman, *City Attorney*, contra.

CAMPBELL J.:

The only question in this case is, whether an owner of an undivided interest in a piece of property which has been assessed without division, can redeem his share from a sale for city taxes.

The city charter, providing for the assessment of property, is silent as to its details, but as the same roll is the basis of all taxation, the general statutes apply so far as not modified by the charter. Under these, no doubt can exist concerning the right to assess undivided interests. And the law expressly provides for the redemption of any undivided interest whatever.

I think the charter very clearly recognizes the right of owners of part interests, to pay their share of taxes to the collectors before sale, whether separately assessed or not. Section 14 of the charter (*L.* 1857, *p.* 144–5) makes the tax a lien upon the property assessed, and renders the owners, occupants, and parties in interest, liable on demand to pay it. The statute could not have intended such an absurdity as that a part owner should be bound to pay the whole tax. Such a construction would avoid the statute, as beyond the power of the Legislature. And in the very next clause provision is made, that in

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case of default in paying the same "*or any part thereof*" the council may proceed to enforce it by the usual process, which is there set forth. In providing for the sale of "real estate," we must hold that the term applies not to whole lots, but to such interests as are not paid upon, or else we must hold that the city may lawfully receive and demand a portion from each part owner, and yet sell the whole estate for the default of one, although the rest have paid, and without allowing the amount of such payments to be deducted. This would be a monstrous doctrine.

The language of section 15, in relation to redemptions, is the same (so far as it refers to property) with that of section 14. And although section 16 uses language somewhat different, yet there is no such difference as would justify us in assuming a different construction when we look at the reason of the matter, and regard the provisions of section 17. The latter section provides means whereby any person in possession, who has been obliged to pay taxes, may recover them back of the owner. But no provision is made whereby a tenant in common may recover of his co-tenant; and in the absence of such a provision, unless a tenant in common can redeem his own share, he may be compelled either to lose it, or pay more than its entire value to retain it.

An undivided interest is just as much a separate estate as a divided one, and the law so regards it. No tenant in common can restrain his co-tenant from disposing of his interest to absentees or irresponsible persons. And such estates are created more frequently by intestacy than by grant. It should be a very clear provision of law which can be construed to apply to these estates a burden of liability for taxes beyond others. And for my own part I am not prepared to admit that the law can validly make any such distinction. No property can be subjected to more than its share of general taxes, without infringing on

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principles of great moment; and I am not willing to apply to any statute a meaning which will render it obnoxious to such consequences, if any other can be reasonably arrived at.

A mandamus must issue as prayed for.

MARTIN, CH. J. concurred.

MANNING J., (dissenting):

The rights of the relator depend on the city charter, which, it seems to me, in regard to the question before us, can have but one meaning, and is therefore too clear to admit of construction. It provides when any land has been sold for a tax, that "if the owners or occupants of, or parties in interest in the same, shall, within one year after such sale, deposit with the treasurer of the city, for the use of the purchaser, the full amount of the assessment or tax for which such real estate was sold," &c., the term for which such real estate was sold shall cease and be determined, at the time of making such deposit. The tax is an entirety that is not susceptible of division, unless authorized by the charter itself; and in the present case the very idea of a division is excluded by the phraseology of the charter, "*the full amount of the assessment or tax for which such real estate was sold.*"

The tax roll is required to be left a certain length of time with the city treasurer, before it is placed in the hands of the collector, to give an opportunity to the tax-payer to save the expenses of collection by paying the tax to him; but there is not any thing in the charter authorizing the treasurer to receive a part of the tax only, nor is there any thing authorizing the collector to receive a part of the tax, and to release a corresponding part of the land from the lien for the balance.

In regard to state, county and town taxes, the statute provides, in express terms, that the collector may receive a part of the tax on a corresponding part of the land taxed,

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and that the tax on a part, or on an undivided interest, may be paid after the tax has been returned, at any time before sale, or after sale and before the time of redemption has expired.

Why this difference between the city taxes of Detroit and other taxes, it is not for us to inquire. Perhaps it may be found in the fact that the fee is sold in one case, while in the other the land is sold for a term of years only.

I think the mandamus should be denied.

CHRISTIANCY J., did not sit, being interested.

Mandamus issued.

Charles A. Lorman v. Henry E. Benson.

The common law is in force in Michigan, and questions of property, not clearly excepted from it, must be determined by the common law, modified only by such circumstances as render it inapplicable to our local affairs.

Although, in England, in the common law sense of the term, those streams only are navigable in which the tide ebbs and flows, yet all rivers and streams above the ebb and flow of the tide, which are of sufficient capacity for useful navigation, are public rivers, and subject to the same general rights which the public exercise in highways by land, and which they possess in navigable waters.

The common law principle, that the soil under such tideless public rivers to the thread of the stream is in the owner of the adjacent bank, prevails in this state, and is applicable to the Detroit River.

The owner of the bank is entitled to every beneficial use of the soil under the river which can be exercised with a due regard to the public easement, and any trespass which interferes with such use, like an obstruction preventing the taking of ice, gives him a right of action for the damages thereby occasioned.

The right to raft logs down a stream does not involve the right of booming them upon private property for safe keeping and storage.

Heard November 29th and 30th, 1859. *Decided January 9th.*

Case reserved from the Circuit Court for the county of Wayne, as follows:

"This was an action of trespass *vi et armis*, brought by Lorman against Benson. Plea, the general issue, with notice of license.

"The cause was tried by the court without a jury.

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"From the evidence adduced on the trial the court find the following facts:

"At and before the time of the alleged trespass, one Anthony Dudgeon was the owner in fee of certain premises above the city of Detroit, and fronting upon the Detroit river, which was the *locus in quo* of the said trespass. On or about the 15th of November, 1857, he leased the same by a lease in writing to the plaintiff, therein describing the same as bounded in front by the Detroit river, for the term of five years; and the plaintiff thereupon entered immediately into possession, and erected an ice house upon the premises, which ice house was fronting upon and near to the waters of the Detroit river. Prior to the execution of this lease Dudgeon had given the defendant, Benson, a parol license to erect a boom near to the shore on the river front of the premises, and between said shore and the channel bank of said river (said channel bank being a term applied to a place in said river nearer to the main bank than the center of the river, and about 700 feet from the shore, where the water becomes some feet deeper than it is nearer to the shore), and to maintain and use the same for the purpose of keeping and securing saw logs therein, until he (Dudgeon) should desire to use the river front for other purposes, or should lease the premises.

When the plaintiff took possession of the premises, under his lease from Dudgeon, the entire river front was occupied and obstructed by a boom, and a large quantity of logs therein, which had been placed there by the defendant in pursuance of this license from Dudgeon. The plaintiff immediately gave the defendant notice to remove the same, claiming that the defendant's right to maintain the same there, under the license from Dudgeon, was terminated; that he, the plaintiff, as the lessee of the premises, was entitled to have the river front free from any such obstruction, in order that he might conveniently gather ice there to fill his ice house during the then coming winter.

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"The defendant refused to remove the said boom and logs as required, but continued to maintain the same in the place mentioned throughout the winter, and this is the trespass complained of by the plaintiff.

In consequence of the river front being so obstructed by the said boom and logs, the plaintiff was unable to gather ice there during the winter of 1857 and 1858, but was compelled to gather his ice with which to fill his ice house at a much greater distance from said ice house, to float the same by circuitous and inconvenient routes to said ice house, at considerably greater expense than would have been necessary if the river front of the premises had been open and unobstructed by defendant's said raft of logs and boom, and he sustained damages in consequence of said obstruction to the amount of .

"Upon these facts the following questions arise:

"1st. Had the plaintiff, as lessee from the owner in fee of the said premises fronting on Detroit river, any such right to the use and enjoyment of the river front between the shore and the channel bank of said river, as entitled him to maintain the present action against the defendant for obstructing the same, with his boom and saw logs, in the manner above mentioned?

"2d. Has the defendant a legal right to float and boom logs in any part of the Detroit river, in a reasonable manner, so as not to interfere with navigation in summer and travel in winter?

"3d. Is trespass or *case* the appropriate form of remedy?

"4th. Have riparian proprietors on the Detroit river a right of property in the soil under the water, or in the ice, or the exclusive right of taking the same in front of the premises to the middle of the stream?

"5th. Are the damages claimed by the plaintiff sufficiently certain and direct to be allowed?

"Which questions, being deemed of sufficient importance, are hereby reserved for the opinion of the Supreme Court thereon."

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Geo. E. Hand, for plaintiff, cited:

Hale De Jure Maris, Ch. 1; 3 *Kent*, 427; *Wool. on Wat.* 1, 40 *to* 46; *Shull's Aq. Rights*, 58, 88, 106, 138; *Ang. on Watercourses*, 605; *Ang. on Tide Waters*, 75; 6 *Cow.* 518; 2 *Conn.* 483; 4 *Burr.* 2164; 12 *Mod.* 510; 1 *Mod.* 105; 3 *How.* 227; 20 *Johns.* 99; 26 *Wend.* 404; 5 *Pick.* 201; 2 *Cush.* 190; 3 *N. H.* 321; 2 *N. H.* 369; 31 *Me.* 9; 3 *Greenl.* 248; 3 *Rand.* 33. 38; 3 *Ohio* 495; 11 *Ohio* 311; 16 *Ohio* 540; 3 *Blackf.* 198; 3 *Scam.* 510; 5 *Gilm.* 548; 2 *Wis.* 308; 4 *Wis.* 486; 3 *S. & M.* 366; 4 *Mason* 397; 1 *Halst.* 1, 67; 5 *H. &. J.* 195; 1 *Rand.* 417; 14 *Mass.* 149; *Taylor*, 176; 5 *Wheat.* 374; 13 *Wend.* 356; 18 *Barb.* 277; 4 *Mich.* 322; 9 *E. L. & Eq.* 513.

T. Romeyn, on same side:

If the Detroit be viewed as a *river*, in the sense of the common law, then the argument already made exhausts the subject.

But if as a *strait*, and the rights of the owners of land on its borders are like those of the owners of lands on the shores of the lakes which it connects, — see *Kingman v. Sparrow*, 12 *Barb.* 201, — it then becomes necessary to ascertain what are the rights of riparian owners upon these Northwestern lakes, and the straits connecting them.

1. The United States, as a sovereignty, have no right of soil, or jurisdiction, in premises situated like the *locus in quo*. — *Pollard's Lessee v. Hagan*, 3 *Howard* 312.

The title to the land under water, on the sale of the contiguous upland, either remains in the United States, or is vested in the States in which it lies, as an incident to the sovereignty, or it passes to the grantee of the upland as an incident to it.

If all the waters covering the land be viewed as not *navigable*, according to the recognized legal meaning of that term, then, beyond question, the lands under them pass from the United States to the grantee of the uplands bordering on them, as an incident to such grants.

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If viewed as navigable waters, then the lands under them either passed to the grantees of the uplands bordering on them, or have become the property of the respective states within which they lie, as incidents to their sovereignty.

2. The title to, and property in, such lands, are not in the *state.*

There is a clear and settled meaning, at common law, attaching to the term "*navigable,*" in connection with the extent of the *rights of riparian proprietors.* In this connection, it is strictly limited to the sea, and to waters within the *ebb* and *flow of the tide.* On these, the rights of the riparian proprietor (in the absence of a grant from the Crown) extend only to high water mark.

In the Atlantic states the rule is similar, though locally modified by statute or usage. But, on other than tide waters, according to the English common law, and the law of most of the states, the title of the riparian proprietor extends beyond the water line, and includes the adjoining lands under water.

The adjudications, in all the states formed out of the Northwestern Territory and bordering on the lakes, concur in deciding that a grant by the United States of lands bordering on the meandered stream or body of water, carries with it a title to the adjacent lands under water.

In Michigan, the question has never been before the Supreme Court directly, but I view the rule in practice as well understood and settled.—*Norris v. Hill*, 1 *Mich.* 202; *Moore v. Sanborn*, 2 *Mich.* 519.

For decisions in other states, see *Grant v. Mathews*, 3 *Ohio* 495; *Lessee of Blanchard v. Porter*, 11 *Ohio* 138; 5 *Ohio* 320; *Ibid.* 410; *Walker v. Board of Pub. Inst.*, 16 *Ohio* 545; *Doe v. Hildreth*, 2 *Ind.* 282; *Jones v. Peckham*, 2 *Wis.* 315; *Middleton v. Pritchard*, 3 *Scam.* 510; *Canal Trustees v. Haven*, 5 *Gilm.*, 548; *Walker v. Shephardson*, 4 *Wis.* 486.

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The Supreme Court of the United States recognize the same rule. — *Brown v. Hager*, 21 *How.* 320.

There is no difference whatever *in principle* between rivers like the Mississippi, the Ohio, the Milwaukee near its mouth, the Illinois, and the lakes or their connecting straits. And the adjudications in the Northwestern states, and in the Courts of the United States, do not refer to, nor imply any.

In the case of *Genesee Chief v. Fitzhugh*, 12 *Howard* 450, the decision avers that the lakes and rivers are *both navigable*, within the meaning of the grant of *admiralty jurisdiction* to the general government, and *both* are placed upon the same footing. It does not touch the question of riparian ownership or rights. But in the reasoning and the conclusion, it is evident that court viewed a great lake and a great river as *alike* in legal character.

There being in fact no distinction at common law between the *sea* and *tide water rivers*, as to admiralty jurisdiction or riparian rights, and there being no distinction as to admiralty jurisdiction or public character between the lakes, and the straits connecting them, and the great navigable rivers of the west, it is illogical and unwarrantable for the court to make such distinction between the rights of riparian owners on the great rivers and those on the lakes.

This question has received a *practical construction* in the Northwestern states, in favor of the rights of the riparian proprietor to lands under shallow water, adjacent to the main land, and not required nor suitable for navition; and should be considered as settled.

Independent of the general rules as to the effect of usage and custom, it is certain that in England rights in this kind of property differ in different localities, through the effects of local usages.

And in the several states, the varying rules on this subject are traced to and rest upon usage and common

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understanding. In regard to these, *usage makes the law.*— See *Hale De Jure Maris, pp.* 5, 6, 15, 19, 25, 26, 27, 28, 35; *Ang. on Tide Waters*, 226; *Ang. on Highways*, 51, 52; *Shunk v. Schuylkill Nav. Co.* 14 *S. & R.* 71; *Bennett v. Boggs, Baldwin* 76; *Bell v. Gough*, 3 *Zab.* 624. There is in fact no such thing as a general common law on this subject. Usage makes the local law.

Whether speculatively right or not, this usage and custom are evidence of what are the public reception and application of the law. By adoption and use they thus make the law. In cases like this the maxim prevails, "*Communis error facit jus.*" — See 3 *Barb. Ch.* 577; 4 *Inst.* 75; 2 *Eden*, 74; *Hopk. Ch.* 267; 5 *Cranch* 32; 1 *S. & R.* 106; *Coke Lit.* 186.

The existence and extent of this general public usage, and of legislative action, will be judicially noticed by the courts. — 1 *Greenl. Ev.* § 6; *Gibson v. Stevens*, 8 *How.* 399.

A. Russell, for defendant, cited:

To the point that the court could not take judicial notice of local law or usage, — 1 *Greenl. Ev.*, § 4, 5, 6; 1 *Steph. Com.* 55. That local custom could not supersede the common law, — *Winder v. Blake*, 4 *Jones* 332. That the law knows no intermediate line between high water mark and the thread of the river, and the riparian proprietor must be bounded by one or the other; *McManus v. Carmichael*, 3 *Iowa* 1.

That the obstruction by the raft was an inconvenience consequentupon the rightful use of the river, and, if occasioned by misfortune or unavoidable accident, there is no legal remedy, — 4 *Harr.* (*Del.*) 315; 4 *Mo.* 343, 345; 3 *S. & M.* 366, 408; 3 *Scam.* 521; 13 *Wend.* 371; 1 *Jones* 299; 31 *Me.* 9, 24; 3 *Yerg.* 307; 2 *Swan* 9; 18 *La.* 295, 305; 1 *Campb.* 517, *note; Angell Tide Waters, pp.* 80, 93; 2 *Mich.* 519; 7 *Martin, N. S.* 433.

And to the main question, — *Ang. on Watercourses*,

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pp. 603. 613; *Walk. Ch. R.* 155; 1 *Newb. Adm.* 543; 1 *Dutch.* 525; 2 *Swan* 9; 4 *Seld.* 472; 18 *Barb.* 277; *Ibid.* 14; 19 *Barb.* 484; 12 *Barb.* 616; *Jacob's Law Dic.* "*Straits.*"

As to the right of property in the ice, provided the riparian proprietor be held to own the bed, — *Gale and Wheat. Easements*, 26, 27; *Ward v. The People*, 6 *Hill*, 146.

CAMPBELL J.:

The rights of the plaintiff in this case depend entirely upon the doctrines applicable to riparian proprietors upon the water communication which is known as Detroit river.

Some reference was made on the argument to the general system of law prevailing here, in view of the former history of the country; but we deem it useless to enter into any extended examination of this question. It is undoubtedly true that at one time the Custom of Paris was in force here. It was expressly abrogated by the Territorial Legislature in 1810, and probably applied to very few cases then, if to any. Practically the common law has prevailed here, in ordinary matters, since our government took possession; and the country has grown up under it. How, or by what particular means, it originated, would open an inquiry more curious than useful. A custom which is as old as the American settlements, and has been universally recognized by every department of government, has made it the law of the land, if not made so otherwise. Our statutes, without this substratum, would not only fail to provide for the great mass of affairs, but would lack the means of safe construction. We are of opinion that questions of property, not clearly excepted from it, must be determined by the common law, modified only by such circumstances as render it inapplicable to our local affairs. Such was the view taken in *Stout v. Keyes*, 2 *Doug. Mich.* 184, and in the opinion of Mr. *Du Ponceau, cited in* 1 *Bish. Cr. Law*, §15, *n.* 4.

There are no tide waters within this state, and there-

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fore no waters which, by the technical meaning of the term "navigable" at common law, would come within it. But we have more than a thousand miles of external boundary waters, which are open to navigation in the popular sense, and many interior streams valuable for purposes of public convenience and passage. The inquiry before us is, whether our circumstances require the common law rule to be so modified as to apply the doctrines belonging to tide waters, navigable in the common law sense, to these waters, which are beyond the tidal influence.

By the Ordinance of 1787, these waters, which are there designated as "navigable," are declared to be public highways. No special force can be derived from this language however, for it applied very evidently not only to ship and vessel navigation, but more generally to the passage of canoes and bateaux, which were then the chief means of conveyance, there being few large vessels and fewer land roads. But the Ordinance couples with the waters the portages or carrying places connecting them, and which were used by the parties making long voyages in small boats, in passing from river to river. Such were the portage between Fox and Wisconsin rivers, that around the falls of St. Mary, and others. We are therefore compelled to look at the nature and situation of the streams themselves, and not to any mere verbal nicety. And it becomes necessary to glance at the rules of the common law as applied in England, and to see how and wherein our position may require a modification of them.

There are, in England, two kinds of water highways. All rivers and streams above the ebb and flow of the tide, which are of sufficient capacity for useful navigation, are public rivers, and subject to the same general rights which the public exercise in highways by land, to which Lord Hale aptly likens them. In these streams the adjacent proprietor owns the banks and bed, and has a right to make such use of this land, and of all benefits of the stream,

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as will not interfere with the public easement or servitude. Formerly it was doubted whether a right to the use of the bank for towage was not appurtenant to the public easement of navigation, but it is now declared to exist only in particular places by local usage. — *Ball v. Herbert*, 3 *T. R.* 263; *Blundell v. Catterall*, 5 *Barn. & Ald.* 268. Wharves, or other appropriations of the bed of the stream were only allowed so far as they did not actually obstruct free navigation, and when they did so, they were indictable as public nuisances. Their analogy to highways was complete. — *Hale de Jure Maris*, *ch.* 2, 3.

All navigable waters in which the tide ebbed and flowed were also public highways. The right of navigation was precisely like that in other public rivers, and there was no right to use the banks for towage. But there were some important distinctions to which we must carefully attend. The grant of land bounded by the stream did not convey the fee to the centre or thread of the stream, but stopped at the line of ordinary high tides, which is declared in the late case of *Attorney General v. Chambers*, 27 *Eng. L. & Eq.*, 242, not to extend up to the line of highest tides, but to that medium line which is the average bound of ordinary and natural high tides throughout the year. The shore (which signifies the land between high and low tide), and the bed of the stream, were the property of the King or of individvals, but presumed to be in the King until shown to belong elsewhere. When owned by the King, it was as part of his *jus privatum*, and subject to be disposed of by him until restrained. — See *Attorney General v. Burridge*, 10 *Price* 350; *Attorney General v. Parmeter*, *Ibid.* 378; *Parmeter v. Attorney General*, *Ibid.* 412. And it was subject to substantially the same rules and burdens whether owned by the King or by private persons. — *Mayor of Colchester v. Brooke*, 7 *Q. B.* 339, *and cases above cited.* The public had a right of navigation over the whole bed of

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the stream at high tide, and over the water, so far as it was practicable, at all tides. As this was a common law right, and only to be repealed by Parliament, the King could not, neither could any one by his authority, make any erections which would obstruct navigation. Thus far his rights were qualified by the public easement, precisely like those of a private owner in the bed of a public stream above tide water. In both classes of streams the public easement controlled the use of the land. The easement reached the high water line whenever the tide was up, and prevented any permanent improvements below that line as effectually as below the ordinary river margin, and no more so, and for no different reason. The owners of the soil in both streams could make any erections which were not nuisances, and their character as nuisances was to be determined as a question of fact:—*King v. Tindal*, 1 *Ad. & E.* 143; *Regina v. Betts*, 22 *Eng. L. & Eq.* 240; *Hale de Port. Mar., pt.* 2 *ch.* 7 *p.* 85. The Legislature could grant to the owners in either case the right to make such erections as would otherwise be unlawful, for they may determine or extinguish any public right; and this power has frequently been exercised; and, when occupied for public use, by railroads or other works, the owner, whether King or subject, is entitled to his damages for the use of it.—See *Rex v. Montague*, 4 *B. & C.* 598; *Abraham v. Great Northern Railway Co.*, 5 *Eng. L. & Eq.* 258.

The principle which gives the land between high and low water mark to the crown, is said, in the case of the *Attorney General v. Chambers* (above cited) to be "that *it is land not capable of ordinary cultivation or occupation;* or, according to the description of Lord Hale, as generally dry and manurable; and so it is in the nature of unappropriated soil. Lord Hale gives as his reason for thinking that lands only covered by the high spring tides do not belong to the crown, that such lands are for the

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most part dry and manurable; and, taking this passage as the only authority at all capable of guiding us, the reasonable conclusion is that the crown's right is limited to lands which are, for the most part, not dry or manurable." — See also *Lowe v. Govett*, 3 *B. & Ad.* 863.

Here then we have the doctrine very clearly maintained, that the riparian owner takes all the land which is of any use for ordinary purposes, and all which is not commonly submerged by the average ordinary high tides, which would seldom leave any of the shore dry more than twenty-four hours at a time. It is not reserved, therefore, as useful land, but as waste land which is characterized by the water service over it. And the firm land, which is made by alluvium, becomes private and not crown property. — *Gifford v. Lord Yarborough*, 5 *Bing.* 163; *Scratton v. Brown*, 4 *B. & C.* 485. But as the public are sometimes said to have rights to some easements on the shore, it may be well to notice what those rights are.

The case of *Blundell v. Catterall*, 5 *Barn. & Ald.* 268, contains a more full investigation of this subject than any other modern case to which our attention has been called. As we have already seen, the public rights are in general the same whether the soil of the bed and shore of tide waters is owned by the crown or by individuals. In the case now referred to, the plaintiff, a private person, owned the shore and upland, and brought an action of trespass against the defendant for crossing the shore on foot, and with carriages and bathing machines. The defendant justified on a claim of a public right of way for bathing purposes. The case was considered by the court upon the general law of the land, and may be regarded therefore as a fair exposition of it. It was held by all the court except Best J. (Abbott C. J., Holroyd and Bayley JJ. concurring) that no general right existed under which the defendant could justify. And it was laid down as a general rule, that the public rights over the shore existed

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not as land but as water-rights, to be exercised when the land was covered by the tides. The only public rights recognized as commonly existing on such waters were those of navigation and fishing; and it was left undecided whether any common right of fishing could ever exist where the soil was private. And it was very clearly held that no one could, of right, plant stakes or other temporary or permanent conveniences for drawing nets on any part of the sea-shore, whether private or not, except the land owners. The right of landing, and of loading and unloading, was held to exist (except by particular custom) only in ports and established landings. And, while it was said that it was quite common to use the shore for various purposes of passage, that use was regarded not as rightful, but merely by sufferance, and analogous to the frequent passage over unenclosed lands, which was not lawful, but was seldom complained of.

When, therefore, we look at the state of the common law upon the subject before us, it is very evident that the ebbing and flowing of the tide, and not the mere susceptibility of the stream to purposes of useful navigation, has made the distinction between the rights of riparian owners on the fresh and tidal public streams of England and that, where these happen also to own the shore on tide waters, their ownership is not distinguishable for any useful purpose, if at all, from their dominion over the beds of fresh water public rivers. By giving in all cases the whole extent of dry and available land to the bordering owner, the law left to the crown, in any case, a very unprofitable ownership, which could rarely aid him, or any grantee, unless the latter owned also the upland.

In both kinds of public streams the rights of navigation were the same; and, so far, the public at large had no interest whatever in the question of ownership of the bed of the water. The right of fishing in navigable rivers was not originally a general common law right of every

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subject, excluding the possibility of a private right to a several fishery, but a prerogative right of the crown, and grantable with, if not attached to, the soil in private hands. Considering the high esteem in which navigation was held in England, we may be sure that no principle would have been allowed to grow up into common law, which would materially impair the shipping interest. And the adjudged cases recognize the common sense doctrine that it did not matter who held the fee of property, so long as the public easement was maintained. We do not find that the public rights over navigable waters belonging, with their beds, to manors, were any more hampered than when the title was in the crown. The doctrine that the whole public easement ceased with the destruction of the navigable character of the waters, is intimated in *Rex v. Montague*, 4 *B. & C.* 498, and strongly confirms *Blundell v. Catterall* in the limitation of public rights not depending on navigation.

The Roman law recognized the title of the river beds as belonging to the riparian proprietors, subject to the public easements of passage and towage, and of moorage on the banks. The modern civil law is said to be generally different in this respect; but it is laid down by Justinian that all newly-formed islands belong to the riparian proprietors; and Vinnius demonstrates that this right is incident to and derived from the ownership of the bed.—*Vinnius Com. on Justin. Lib.* 2 *Tit.* 1, §§ 4, 5, 20, 22, 23. And see also the opinion of the Chancellor in *Canal Appraisers v. The People*, 17 *Wend.* 592, 3.

It is also worthy of remark, that in this country, in most of the states where it has become necessary to discuss tide-water rights, all of the modifications made have been in favor of riparian owners, extending their privileges beyond those at common law. We do not deem it necessary to review the many cases cited on this subject by counsel. They differ in many particulars, but in most of them we perceive an enlargement of riparian privileges, and in no case is there any curtailment of them.

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In applying the principles of the common law to the tideless stream in question, we do not perceive what public interests would be subserved by placing it on the footing of tide waters, when the rules applying to public fresh water streams provide amply for every common easement. The right of navigation, to which all others are subservient, is in no way injured or abridged by this holding. And the necessities of wharves, and other conveniences, which could not be made available at all in such a stream as this unless owned by the riparian proprietor (because not accessible except over his grounds), would be an inducement to modify the common law, were it otherwise, rather than change it as it is now. We can perceive no advantage to the state in setting up a barren and useless title. We think that in this respect the common law is already adapted to our circumstances, and needs no changing.

It is urged that this ruling will interfere with the improvement of rivers, and disturb the title of islands. But these objections are not well taken. The public authorities can regulate water highways as well as land highways, although the soil of neither belongs to the state. And if the government see fit (as is the case with all islands in this river, which have not only been kept separate as property from the mainland, but most have been named and distributed between Great Britain and the United States by treaty) to regard each island as a separate property, this infringes no common law rule. Islands have always been susceptible of separate ownership, and when so separated the *filum aquae* is to be drawn between them and the mainland. The facts before us create none of the embarrassments which have been suggested to us, and we have no difficulty in holding that the plaintiff is entitled to every beneficial use of the property in question which can be exercised with a due regard to the common easement. The cutting of ice is the exercise of a valuable privilege in securing that which has become stationary on the freehold;

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and we can conceive of no reason which would justify a denial of it. And we think a trespass creating an obstruction which prevents it, justifies a finding of damages for this as a direct consequence of the injury. — *White v. Mosely*, 8 *Pick.* 356. The right to raft logs down the stream does not involve the right of booming them upon private property for safe keeping and storage, any more than the right to travel a highway justifies the leaving of wagons standing indefinitely in front of private dwellings or stores. And the booms in question were erected under a license from the plaintiff's grantor now determined, and not under any right or claim of right as appurtenant to navigation.

The cases cited from Ohio, Indiana, Illinois, and Wisconsin, as well as from some of the older states, show, as we think, that the common law rule is the most desirable one, so far as fresh streams are concerned.

Had the usage of this region been inconsistent with the rule we have adopted, that might afford some reason for doubting its applicability. But usage has uniformly conformed to it, and, so far as we have any legislation bearing upon the subject, it recognizes the rights of private owners fully. The charter of Detroit, passed in 1827, contained the following provisions: "That nothing in this act contained shall be construed to vest in the said corporation, or any officers thereof, any right to the water, or the land under the water, in front of the farms included within the said city, nor any power to erect, or cause or authorize to be erected, any wharf or other thing on the said land; *but the right of the proprietors of the said farms, to the water and land in front of said farms, and to fill in the water, and erect fixtures thereon, shall remain and vest in said proprietors the same as if this law had not passed. R. L. of* 1827, *p.* 588, §49. This provision was preserved in terms until the passage of the new charter of 1857, which indirectly recognizes the same principle, by giving to the city power to regulate navigation, and to build wharves on their

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own property; but, as to all other property, merely to establish a line beyond which wharves shall not extend.—*L.* 1857, *p.* 95. The right of individuals has been constantly asserted and exercised.

We think that the plaintiff has, under his lease, a legal interest in the land covered with water, which will support the action of trespass; and that the hindrance in taking ice was the proper subject of damages under the case presented.

The other Justices concurred.

Paulina Fish v. Charles C. Morse and another, Administrators of Henry M. Fish.

Where, on appeal from the decision of commissioners disallowing a claim against the estate of a deceased person, declaration is filed in the Circuit Court on such claim, but containing, also, a count on an account stated with the administrators as such, such count may be treated as surplusage, and judgment against the claimant will not be reversed because the jury failed to pass upon the issue made on such count.

Where commissioners have been appointed to examine and adjust claims against the estate of a deceased person, the estate is not bound by an account stated with the administrators. And, therefore, in a suit against the estate, a count on such an account stated is bad.

Heard January 5th. Decided January 9th.

Error to Lenawee Circuit.

From the return to the writ of error, it appears that plaintiff in error took an appeal to the Circuit Court from the decision of commissioners, appointed by the Probate Court of said county, to examine and adjust claims against the estate of Henry M. Fish deceased. The report of the commissioners to the Probate Court showed, among the claims disallowed, one of "Paulina Fish, note, $5,000." In the Circuit Court an issue was directed to be made up by the parties, and the claimant filed declaration accordingly, containing two counts; the first counting on indebtedness of the deceased, and a promise by him in his life time to pay

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the same; and the second alleging that defendants, administrators, after his decease "were indebted to the plaintiff in the sum of six thousand dollars, found to be due from the defendants, as administrators as aforesaid, to the plaintiff, on an account stated between them. To this declaration was attached a copy of a note for $5,000, purporting to have been made by the deceased, with the usual notice that it would be given in evidence under the declaration. Defendants pleaded the general issue.

On trial by a jury, a verdict was returned "that the said Henry M. Fish, deceased, did not undertake and promise in manner and form as charged in the plaintiff's declaration;" upon which verdict judgment was rendered for the defendants generally, for their costs. Plaintiff removed the cause to this court, alleging for error, that the jury only decided the issue made upon the first count of the declaration.

A. L. Millerd, for plaintiff in error:

The verdict must embrace all the issues, or it will be error to enter judgment upon it.—6 *Ohio* 521; 3 *Wend.* 667; 6 *Wend.* 273; 13 *Wend.* 425. And though the court may mould a verdict into form, it can not supply substantial omissions in it.—6 *Wend.* 273.

MARTIN CH. J. What issue could be made in the case except that which the jury have passed upon; that is, whether the *deceased* promised as alleged by the claimant before the commissioners?

Millerd: The parties have made a further issue, and *non constat* from this record, that plaintiff did not seek to recover under the second count, on a note or other promise of the administrators, given for a debt of the deceased. The power of administrators to adjust claims against estates is not taken away by the statute. And if parties voluntarily make an issue which would embrace a demand

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the commissioners could not pass upon, they can not afterwards object that the issue is too broad. The case is then to be treated as the voluntary joining of a new issue in the Circuit Court, and to be proceeded in without regard to the proceedings before the commissioners, or the appeal.

CAMPBELL J. But have you not here a fatal misjoinder of counts?

Millerd: The declaration is from a form in *Chitty's Pleadings*, and the same form is found in *Tillinghast.* We submit that judgment against defendants on the second count would be judgment *de bonis intestatoris.*

Beecher & Howell, and *T. M. Cooley*, for defendants in error.

MANNING J.:

It appears from the report of the commissioners to the Probate Court, that the claim disallowed by the commissioners was a promisory note for $5,000. In making up the issue in the Circuit Court, the plaintiff filed a declaration containing two counts, instead of one. The first count is on a promise made by the intestate in his life-time, and the other on a promise made by the administrators on an account stated after the death of the intestate, between plaintiff and the administrators.

A copy of the note, with notice that it would be given in evidence on the trial, was attached to the declaration.

The first count, with a copy of the note attached to the declaration, was all that was necessary to put in issue the claim that had been passed on by the commissioners, and the second count may be regarded as surplusage merely. It is moreover defective on its face, as it does not show a valid claim against the estate of the deceased.

Under our probate system, all claims against the estate of a deceased person, when commissioners have been ap-

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pointed to hear and adjust such claims, are to be presented to, and to be allowed by them. The estate is not bound by any account stated with the administrator.

Had the jury, therefore, found for plaintiff on the second count, and assessed damages in her favor, it would have been the duty of the court to render the judgment it did, notwithstanding such finding, as they had found for defendants on the first and only count in the declaration that set forth a valid claim against the estate.

The judgment must be affirmed with costs.

MARTIN CH. J., and CAMPBELL J. concurred.

CHRISTIANCY J., was absent.

William Hale v. Silas M. Holmes and others.

A bill in Chancery cannot be sustained to compel a vendor to receive his own paper on the contract of sale, when he has not agreed to do so, and the purchaser has not bound himself to take and pay for the property.

Nor will equity compel a set off of the vendor's debt on the contract of sale, in such case, since there is no contract on the part of the purchaser against which to allow it. It is at his option to purchase the property or not; but, if he do so, he must pay for it in accordance with the contract of sale.

The insolvency of one party, even in the case of mutual credits, is not of itself sufficient to authorize an equitable set off.

Where a party receives a compromise note from his debtor, with collateral security, agreeing that if paid when due the original debt shall be discharged, otherwise of force, and after the compromise note comes due and is unpaid, sells and transfers the same with the collaterals and the original debt, he thereby confirms the compromise; and, the purchaser cannot claim the amount of the original debt on the ground of forfeiture of the compromise agreement before he purchased.

And, where the collateral security in such case was the note of the purchaser, which became due before the compromise note, and was relied upon to pay the compromise note—*Held*, that the effect of the purchase was a payment of the compromise note by the said note of the purchaser, and that he had no claim, at law or in equity, upon the original debt.

Heard January 5th. Decided January 9th.

Appeal from Wayne Circuit in Chancery.

From the pleadings and proofs, it appears that on May

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13th, 1858, the defendants, composing the firm of Holmes & Co., were indebted to Waldo, Barry & Co., of New York, in the sum of $5,576 19, besides interest, upon four promisory notes; and being embarrassed in their circumstances, entered into an agreement with them for a compromise of the demand for $2,949 97, for which amount they gave their note at eight months, and turned out as collateral security to it, a note against complainant of $2,500, dated February 15th, 1858, payable six months after date, and secured by mortgage. For this compromise note and collateral security, Waldo, Barry & Co. gave a receipt, in which they agreed that if the compromise note was paid at maturity, the four original notes and the security were to be given up, but otherwise to remain in full force.

Previous to this time, on January 16th, 1858, complainant made a bargain with defendants for a mortgage they held upon the furniture of the Russell House, Detroit, given by W. H. Russell, to secure $16,000; and they gave complainant a writing in which they promised that on his paying $9,000 in four equal semi-annual instalments, they would assign him this mortgage. Complainant paid the first of these instalments, but did not pay the second when it came due, nor his note of $2,500, so turned out to Waldo, Barry & Co.; nor did defendants pay their compromise note when it matured.

On December 21st, or 22d, 1858, one of the members of Holmes & Co. called upon Waldo, Barry & Co., and stated to them that, in consequence of complainant failing to make his payments, the former were not able to meet their compromise note, and asked W. B. & Co., to wait upon them for thirty days longer. Holmes & Co., claimed that this request was assented to, but this was denied by W. B. & Co.

January 12th, 1859, complainant called on Waldo, Barry & Co., and said he had not been able to pay his note when it matured, but that a friend would furnish him the money

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to buy up the Holmes & Co. notes, and the securities; and proposed to make the purchase. This was assented to by W., B. & Co., and on complainant paying $3,000 therefor, the four original notes, together with the compromise note and the collaterals, were transferred to complainant by an instrument in writing, "subject to all the rights and equities in favor of Holmes & Co., in the hands of said Hale and his assigns as they" were "or would be in" the hands of Waldo, Barry & Co., if they "had retained them instead of selling them to said Hale." In this writing was set out a copy of the compromise agreement with Holmes & Co. Waldo, on being subsequently inquired of by Holmes & Co. why this was done, replied that "Hale had told them he could keep Holmes & Co. out of their money for two years, and he would not be bothered any further with it."

January 24th, 1859, Hale called on Holmes & Co., and offered to pay the amount due towards the purchase of the Russell chattel mortgage, by applying the same on the said four original notes of Holmes & Co., which the latter refused. He then filed his bill in chancery, alleging the insolvency of Holmes & Co., and praying that they be decreed to apply on said purchase the amount of said four notes, or so much as would be necessary to satisfy the instalments past due on said purchase; and that they be enjoined from proceeding to collect such chattel mortgage.

The Circuit Court made decree substantially as prayed by complainant, applying on said four notes complainant's note of $2,500, and the amount past due on said contract for the purchase of the chattel mortgage. Defendants appealed.

W. Gray, for defendants:

The compromise agreement was at an end, and the four original notes in full force, on the failure to pay the compromise amount. If Waldo, Barry & Co., or Hale as assignee, did not return the collaterals, the most Holmes & Co. could claim would be that they be applied at their

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face, upon the original indebtedness. Retaining and applying them does not continue the compromise agreement. — *McClung v. Lyster*, 3 *Green* (*Iowa*) 182, 185. It would be a useless ceremony for Hale to return to Holmes & Co. his own one note which they would again have to restore.

G. V. N. Lothrop, for defendants:

Hale, by his own wrong in not paying his note, aided in producing the default of defendants to pay their compromise note. And equity will not permit him to take advantage of the default. — 2 *Story Eq. Juris.*, § 1304; 22 *Conn.* 513; 21 *Vt.* 469.

The condition in the compromise agreement was in the nature of a penalty to secure the payment of the compromise amount. Equity will not aid in the enforcement of a penalty: — 2 *Story Eq. Juris.* §§ 1319. 1321; 4 *Johns. Ch.* 415; 22 *Conn.* 513; 21 *Me.* 251; 2 *Johns. Ch.* 526: but will ordinarily give affirmative relief against forfeitures depending on time merely: — 23 *Vt.* 576; 2 *Barb.* 37; 29 *Me.* 351; 8 *Paige* 425; 6 *Wheat.* 528; 11 *Paige* 353; 4 *Scam.* 202. Equity gives relief against conditions precedent and subsequent, and will not, by an oppressive and unconscientious advantage taken under them, suffer a right to be defeated. — 2 *Conn.* 299; 1 *Edw. Ch.* 394; *Wal. Ch.* 405; 1 *Fost.* 149; 29 *Vt.* 358; 4 *R. I.* 225. Delay may amount to a waiver of condition — 32 *Me.* 394; 33 *Eng. L. & Eq.* 133. Or acts inconsistent with rescision by the party who has a right to rescind. — 28 *Miss.* 114; 12 *Barb.* 440. Waldo, Barry & Co. could not abandon the compromise, and still hold and sell the compromise securities. — 13 *Ill.* 611; 4 *Fost.* 278; *Ibid.* 282; 8 *Paige* 606; 2 *Hill* 288; 5 *Hill* 390; 5 *Barb.* 319; 3 *E. D. Smith* 269; 34 *N. H.* 556; 4 *Mich.* 508.

This was not a case for equitable set off. — 2 *Story Eq. Juris.* § 1435; 2 *How.* 390; 27 *Ala.* 507; 1 *Cr. & Ph.* 161; 10 *Paige* 369; 2 *Barb.* 589; 5 *Mason* 201; 2 *Sumn.* 628.

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HALE v HOLMES.

MARTIN CH. J.:

In January, 1858, the defendants held a mortgage of Wm. H. Russell, upon certain personal property in the Russell House, in Detroit, to secure the payment of $16,000. This mortgage they agreed to assign to Hale upon his payment to them of $9,000, in four equal installments, at six, twelve, eighteen and twenty-four months; but took no contract from Hale to make such payment. Their obligation to assign the Russell mortgage was dependant upon the prompt payment by Hale of the several installments above mentioned.

Hale paid the first installment, but made default upon the second, as the defendants claim; and they are about to take possession of the property and foreclose the mortgage for that reason.

Hale files this bill to restrain such foreclosure, and for specific relief; claiming that he holds liabilities of the defendants to a much larger amount than is due them, which, or so much as is necessary, he is entitled in equity to have allowed as payment towards the purchase of the Russell mortgage, and to prevent the threatened forfeiture of his right to purchase it. This claim of right is based upon the alleged insolvency of the defendants.

Whether we regard the bill as one filed to relieve against a forfeiture of the agreement, or to secure an equitable set off (and both grounds were taken upon the argument), it can not be sustained. In a variety of cases, as where one is prevented by unavoidable accident, or by the wrongful act of the other party, from making payment, or when the principal amount of the contract price has been paid, and the like, it is true that a court of equity will interfere to relieve against a forfeiture; but never where such relief can only be afforded by compelling a party to receive his own obligations, when the agreement contains no mutual promises, and where such interference would be to vary the terms of the contract forfeited.

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Nor is this a case in which equity will interfere to compel a set off. No set off can exist at law, because no contract upon the part of Hale exists against which to allow it. There is nothing but the offer of Holmes & Co. to convey, upon the payment of $9,000 in certain fixed installments, the debt and mortgage of Russell for $16,000. The option remained with Hale to purchase it or not, but if he would, he must do so according to the terms of such offer. There is no mutual credit, and insolvency alone is insufficient, even in a case of positive indebtedness, to authorize an equitable off set. This we expressly held in *Lockwood v. Beckwith*, 6 *Mich.* 167.

But the cose itself, as developed by the pleadings and proof, is not one entitling the complainant to any relief.

Whether the agreement by Waldo, Barry & Co., with the defendants, for the compromise of the latter's indebtedness, might have been forfeited by the former or not, is wholly immaterial under the facts now existing, and it is also immaterial whether they agreed or not to extend the time for payment of the compromise note. When the latter note was given, the defendants placed in the hands of Waldo, Barry & Co. the promissory note of this complainant for $2,500, together with a mortgage held as collateral security for its payment, to be held by Waldo, Barry & Co. as collateral security for the payment of such compromise note. This note of the complainants was past due when the compromise note became due. When the second installment under the defendants' agreement with the complainant was about falling due, and upon which the defendants relied (and this Waldo, Barry & Co. evidently knew) to take up their compromise note, we find Hale in New York negociating for the purchase of the defendants' paper in Waldo, Barry & Co.'s hands, and obtaining it under what savors very strongly of a threat. He knew that they, as well as the defendants, relied upon his payment of this installment to take up the compromise note;

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and the extraordinary benefits offered to him in the agreement of the defendants, might well induce them to rely confidently upon it. When therefore he told Waldo, Barry & Co. that "he could keep defendants out of the money two years," they undoubtedly became satisfied that the most they could hope for was the amount of the compromise note, secured by Hale's obligation. They therefore sold to Hale such note, for the sum of $3,000, and transferred to him the four notes which were to be satisfied by its payment, and the securities, viz. Hale's note and the mortgage held as collateral to it. This was the real transaction as understood by the parties, if we are to believe Waldo, and so the written assignment executed by them must be interpreted. Hale, then, never purchased the notes covered by the compromise note, so as to acquire the right to demand payment of them; as by selling the compromise note and surrendering to him the security deposited to ensure its payment only, and not that of the four notes, they confirmed the compromise. The effect of the transaction therefore is simply this: By taking up his own note and security, he cancelled them; and what he claims to be a purchase of the compromise note, is in reality a payment of his note which secured it. If he has any claim upon the defendants, it is only for the difference between the amount due upon his note, and the amount of the compromise note: but with this question we have no concern. He never acquired any claim against the defendants by procuring the four notes transferred with the compromise note, which he can enforce either at law or in equity. They were paid by the payment of his note in the manner indicated.

The decree of the court below must be reversed, and the bill dismissed, with costs of this court and of the court below.

MANNING, and CAMPBELL JJ., concurred.

CHRISTIANCY J., was absent.

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William Wyckoff v. Francis W. Carr.

Where an assignment for the benefit of creditors is attacked as fraudulent, it is competent for the creditors attacking it to prove the declarations of the assignor, made after the assignment was signed and delivered, but before the schedules were made out and attached, and while the assignor was engaged in preparing them.

The cases of *Oliver v. Eaton*, 7 Mich. 108, and *Bagg v. Jerome*, 7 Mich. 145, approved.

Heard January 7th. Decided January 9th.

Error to Jackson Circuit.

Carr sued Wyckoff in the court below, in trover, for a stock of goods which Wychoff, as sheriff of Jackson county, had taken on attachments as the property of one Pool. Carr claimed the goods by virtue of a general assignment made to him by Pool for the benefit of creditors.

On the trial, after plaintiff had rested his case, defendant called Eugene Pringle as a witness, who testified that at the time of the assignment he had in his hands demands against Pool, and on the next Monday after the date of the assignment he called on Pool, at the store where the goods were, and Pool there made a statement to him relative to the schedule to the assignment. Defendant's counsel then asked the witness what this statement was. Plaintiff's counsel objected to the question, and the court sustained the objection. The witness further stated that he asked Pool to let him see the schedule of property, and that he afterwards asked him if the schedule was made out. Defendant's counsel then asked the witness what Pool said in answer to this inquiry. Plaintiff's counsel objected to the question, and the court sustained the objection.

The witness further testified that Carr afterwards told him the schedule was not yet made out, but that three or four weeks later he informed him it was then completed.

From Pool's testimony, who had been previously called as a witness for plaintiff, it appeared that the schedule was made out on the next Tuesday after the date of the assign-

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ment. At the time of the interview with Pringle, he was acting as clerk for Carr in selling the goods. The assignment was delivered to Carr on the day of its date.

There was evidence in the case that a short time before the assignment, Pool had bought out one who had been a partner with him in business; and defendant's counsel asked the court to charge the jury that if they should find, from the testimony, that Pool, in contemplation of making an assignment, purchased his partner's interest and dissolved the partnership, then such purchase and dissolution were conclusive evidence of fraud in law, and would render the assignment fraudulent in law. The court refused so to charge, but did charge that the purchase by Pool of his partner's interest, if made in contemplation of assignment, was a matter for their consideration from which to determine whether there was or was not actual fraud in making the assignment. The court further charged that the annexing of a schedule of the property assigned was not absolutely essential to the validity of the deed, and that in the absence of fraud the deed would convey the property without a schedule; but that it was proper for the jury to consider the time, manner and other circumstances of making and attaching the schedule, for the purpose of determining whether the assignment was made with fraudulent intent or not. The jury rendered a verdict for plaintiff.

The errors assigned in this court were, 1st and 2d, that the court erred in sustaining the objections to the questions asked Pringle; and 3d and 4th, that the court erred in its charge to the jury as above given.

Johnson & Higby, for plaintiff in error:

Pool, at the time of the interview with Pringle, was in possession of the property, either as agent of the assignee or in the duty of completing the assignment by making out the schedule of the property. In either case his declara-

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tions were admissible. If engaged in completing the assignment, his declarations would be those of a principal, and admissible as such.

Blair & Gibson, for defendant in error:

The declarations of the former owner of personal property can not be given in evidence to affect the title of the succeeding owner, where such declarations are made after he has parted with his interest. — 1 *Greenl. Ev.* §192 *and note* 2; 12 *Wend.* 164; 7 *Cow.* 752; 8 *Wend.* 490; 1 *Comst.* 519. The statement of Pool, called for, was not admissible as part of the *res gestæ*. He was not in possession, but acting as a mere clerk. The offer of testimony was an attempt to destroy a contract by a conversation between others, and not to show possession, or the character of that possession. The declarations of a person in possession of property, and not a party to the suit, are only admitted on the principle that they are cotemporaneous with and explanatory of some act which is admissible, and therefore part of the *res gestæ*. — 2 *Mich.* 390; 1 *Gray*, 551; 14 *N. H.* 101; 2 *Shep.* 32; 3 *Kern.* 582; 24 *Pick.* 242.

MARTIN CH. J.:

We think the Circuit Judge erred in sustaining the objections made to the questions propounded to Pringle, as to the statements of Pool to him, touching the schedule. Although the assignment may then have been so far completed as to render it a valid conveyance of Pool's property, in the absence of fraud, (which is a question not submitted to us) yet these statements, whatever they were, appear to have been made before the schedule was made out and attached, and while Pool was making it. He still had the ostensible custody of the property, but whether under Carr's employment, or in his own right, was a question to be determined on the trial. The transaction was claimed to be fraudulent, and the defendant below was attempting to prove

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it to be such. Pringle represented some of the creditors of Pool, and interrogated him respecting the schedule. Situated as Pool was in relation to the assignment, the property and the assignee, and the object of the inquiry being to ascertain the real nature of the transaction, his answers were competent evidence, and should have been admitted. They would not be the statements of an indifferent party, nor would the evidence be hearsay; but the statements of an actor pending the transaction, made before its full completion. In cases where fraud is the subject of investigation, the statements of the parties charged with it are, and must of necessity be, permissible in evidence if made before the instrument charged to be fraudulent is completed, or while it is being made. Otherwise in the great majority of cases fraud as a fact could never be shown. It would not only be an unsafe but an unjust rule, which should confine a party attacking an instrument upon such ground, to the testimony of the party charged with the fraud. It is claimed that these statements, so long as the assignment had been made, were not a part of the *res gestæ*, and consequently the evidence of Pringle would be hearsay—Pool being the only competent witness, by whom to prove the facts sought to be established. As an actor, his statements may be proven by any one who heard them, as well as by himself, even although his statements were not strictly *res gestæ*, not being facts in the transaction, nor made by him while in the act of making the schedule, although made during the period which elapsed between its commencement and completion. Much difficulty exists at times in determining what declarations are *res gestæ*, but there is none in holding that the declarations of a party in interest, although at the time he is taking measures to divest himself of his interest, or that those of an actor, before the transaction is completed, are admissible evidence, on the ground of such interest, or relation to the transaction.

For this error, we think the judgment should be reversed, and a new trial granted.

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The third and fourth assignments of error are determined by the cases of *Oliver v. Eaton*, and *Bagg v. Jerome*, in 7th Michigan Reports.

The other Justices concurred.

Judgment reversed.

William Wyckoff v. Luke B. Wyllis.

One engaged in a business which would entitle him to claim a team as exempt from execution, has a right, at his option, to select instead thereof other property to the value of $250, necessary to enable him to carry on the same business, though without a team he would be obliged to change entirely the mode of conducting the business.

It is the duty of an officer levying an attachment on the stock in trade of a judgment debtor, to have an inventory and appraisal made out, and permit the debtor to select out the amount exempt from execution; and, on the debtor failing to do so, to make the selection for him. And, if the officer neglect this duty, he is liable to the debtor for the value of the property exempt.

Heard January 7th. Decided January 9th.

Error to Jackson Circuit.

Wyllis sued Wyckoff, who is Sheriff of Jackson County, in trover, and declared for the conversion of a span of horses, a harness and wagon, and a peddler's stock of goods, which Wychoff had taken by virtue of an attachment against the goods and chattels of Wyllis. The case is sufficiently stated in the opinion.

Johnson & Higby, for plaintiff in error.

Blair & Gibson, for defendant in error.

CAMPBELL J.:

The case finds that the plaintiff in error, as sheriff of the county of Jackson, seized upon all the personal property of the defendant, consisting of horses, wagon and harness, which were necessary to enable him to carry on his busi-

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ness of peddling, and his stock of goods used in that business, amounting together to $2,389 97. It is not found that any appraisal was made, or notice given to the defendant of the levy, or any selection made by the sheriff of any goods or property as exempt for the defendant. The horses were found to be worth $275, the wagon $180, and the harness $20. The court below, upon an action brought by the defendant in error, rendered judgment in his favor for $250, the amount to which an exemption is allowed for articles to enable a debtor to carry on his business.

It is claimed by the plaintiff in error, that there can be no exemption of a team, a wagon, or harness, separately under this finding, on the ground that all were found to be necessary, and not a part only. We think there is no force in this objection. The statute exempts any articles whatever necessary to enable a person to carry on the business in which he is principally engaged, so long as the articles set apart do not exceed $250 in value. The defendant, if he had been afforded the opportunity, might have selected that amount either in goods or in such of his other property mentioned as he pleased. He may select a single horse, or a wagon, as well as a double team with or without a wagon. And he might prefer to save a small stock of merchandise, to carry on his peddling business on a lighter scale without a wagon.

We held in *Elliott v. Whitmore*, 5 *Mich.* 532, that it it was the sheriff's duty on the levy of an execution upon goods, a portion of which were exempt by law, to have an inventory and appraisal made out, and permit the defendant to select, or, on his neglect, to select for him property to the amount allowed by law; and that, failing in this duty, he was liable to an action.—2 *Comp. L. p.* 1212, §§ 4466, 4467. We think the duty of the officer is equally clear under the attachment law. The writ is issued commanding the seizure only of such property as is exempt from execution. Upon seizing property the officer is requir-

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ed by sections 4747, 4748, (*Comp. L.* 1270) to make an inventory and serve a copy of it, with a copy of the writ, upon the defendant if he is found in the county, and to have an appraisement of the property made by two disinterested freeholders. The inventory and appraisal conform precisely to those required upon a levy under execution; and when these are made, the sheriff can have no difficulty in setting apart the requisite amount, in case the debtor fails to do so. There is no evidence before us that the debtor was ever notified of the levy as required by law; but had he been notified, his default to select does not destroy the exemption, but merely leaves the selection of property to be made by the sheriff. Had the attachment law failed to provide for an inventory and appraisal, we are not prepared to say how far the analogies of an execution levy would apply. But we see no difficulty in the way, when those means are afforded to enable any one to select articles of the proper value.

There was no error in the judgment, and it must be affirmed with costs.

MARTIN CH. J., and MANNING J. concurred.

CHRISTIANCY J., was absent.

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APRIL TERM, 1860, AT DETROIT.

John Thomas and others v. Cyrus C. Dodge.

Where the owner of negotiable paper sells it, and accompanies the sale by a guaranty of collection endorsed thereon, it is not necessary to the validity of such guaranty that the name of the guarantee should appear in it.

A guaranty so given is not within the Statute of Frauds.

Where the amount of the note guaranteed is such that suit may be brought upon it either in a Justice's Court or in the Circuit Court, the condition of the guaranty of collection is complied with by obtaining judgment in Justice's Court, and making due endeavor to collect it by execution.

And, it is not necessary that a transcript of such judgment be filed in the Circuit Court, and execution against lands issued thereon, where it clearly appears that the judgment debtor has no real estate liable to execution.

A village lot and house, of less than fifteen hundred dollars value, occupied by the owner with his family, does not require any action on the part of the owner to render it exempt from execution.

Heard January 6th. Decided April 6th.

Case reserved from Ingham Circuit.

In November, 1856, one Davidson executed and delivered to defendant a promisory note for $200, payable eighteen months after date, to defendant or bearer. January 2, 1857, defendant sold this note to plaintiffs, and at the same time endorsed thereon the following guaranty: "I guarantee the collection of this note. January 2d, 1857. C. C. Dodge."

Plaintiffs, in October, 1858, put this note in judgment against Davidson, before a justice of the peace, and execution was afterwards issued on this judgment and returned unsatisfied. Plaintiffs then brought suit upon the guaranty.

The cause being tried by the Circuit Judge without a jury, the Judge found from the evidence that Davidson had no goods or chattels liable to execution, from the time the note came due until the return of the execution,

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but that he was all that time owner of a house and lot in Lansing, worth $1,000, and was a householder occupying the same with his family, but had no other real estate.

The defendant objected on the trial to any evidence showing to whom such guaranty was made, and the same was taken subject to the objection. He also objected to a recovery,

First, That said guaranty is void and inoperative, because it does not show with whom the contract of guaranty was made; and that parol evidence showing that fact was inadmissible:

Second, That before plaintiffs are entitled to recover, they must exhaust their legal remedy against Davidson, which could only be done by procuring an execution against the real as well as the personal estate of Davidson.

And these objections the Circuit Judge reserved for the opinion of this court.

J. W. Longyear, for plaintiffs:

It was competent to show by parol with whom the contract of guaranty was made.—19 *Wend.* 565; 26 *Wend.* 436; 13 *Mass.* 158; 6 *Wend.* 637, 644.

A proper return of no property to the justice's execution made out a *prima facie* case against defendant. To defeat the action, defendant must show that the maker had real estate of some value liable to be sold on execution.—11 *Wend.* 629; 4 *Hill*, 650; 4 *Cow.* 173; 1 *Caines*, 437.

O. M. Barnes, for defendant:

1. The Statute of Frauds requiring the contract to be in writing, all the *essentials* of the contract must be in writing. And unless the name of the guarantee appears in the guaranty, or can be certainly ascertained by reference to the instrument guaranteed, the guaranty is void.—1 *N. H.* 157; 5 *Esp.* 240; 4 *B. & P.* 253; 10 *Conn.* 192;

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3 *Johns.* 419; 14 *Wend.* 231; 5 *Hill*, 145; 5 *Barb.* 503; 25 *Barb.* 625. To allow parol proof as to who was the guarantee, would allow that to rest in parol which the statute requires to be in writing.—See 1 *Greenl. Ev.*, §86; 4 *Seld.* 213.

2. It was necessary for plaintiffs to exhaust their legal remedies against the maker of the note, and this they have not done until they have had execution against the real as well as the personal estate. In case of a demand of this size, an execution against lands may reasonably be supposed to have been within the understanding of the parties at the time the contract was made. It can not be supposed that defendant meant to engage that Davidson should have goods and chattels enough alone to satisfy so large a debt.

For a construction of the language used in this guaranty, see 2 *Am. Lead. Cas.* 96 *to* 99; *Edw. on Bills*, 234 *to* 238; 1 *Wend.* 457; 19 *Johns.* 69; 13 *Wend.* 543; 14 *Wend.* 231; 4 *Cow.* 188.

3. Suit should have been immediately brought on the note when due, in order to comply with the conditions of the guaranty.—See 19 *Johns.* 69, *and cases above cited.*

CAMPBELL J.:

The first objection to the recovery by the plaintiffs is made upon the ground that, by omitting to name any person to whom the guaranty of collection was made, the contract failed to comply with the Statute of Frauds, which requires a writing.

There are many cases in which a liability may be created against a person for the debt of another, without mentioning the name of any creditor; the guarantor's proposition being in the nature of an open offer closed by acceptance of it. And Mr. Burge lays it down as a general proposition, that the name of the creditor to be secured may be established by parol.—*Burge on Suretyship*, 31, *citing Bate-*

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man v. Phillips, 15 *East* 272. There would seem to be no good reason for holding such a guaranty as the one before us void, if it were held to come within the statute.

But counsel have inadvertently overlooked the fact that when the owner of negotiable paper sells it, and accompanies the sale by a guaranty, his undertaking being founded on a new consideration enuring to his own benefit, and not to that of the maker of the note, has been held in this state to take the case out of the operation of the statute entirely. This was decided in *Jones v. Palmer*, 1 *Doug. Mich.* 379. The same doctrine has been long recognized in New York.—*Brown v. Curtiss*, 2 *Comst.* 225. See also a collection of cases in a note to the latter case, in 2 *Comst.* 588: also *Brown on St. of Fr.*, § 165. And Parsons adopts the same views.—2 *Pars. on Cont.* 306.

The guaranty being one of collection, and not of payment, it is claimed that the facts in the case do not establish the inability of the plaintiff to collect of the principal debtor.

It can hardly be contended that a guaranty of collection requires suit to be brought in any particular one of several courts which have jurisdiction. The remedies differ in substance, as well as in form, in various tribunals. One moves more rapidly than another, and sometimes one may reach property beyond the process of another. It would, as it seems to us, be importing a new element into this contract to construe it as requiring a suit in a court of record.

A transcript may be filed of a justice's judgment for less than one hundred dollars, in order to reach real estate, as well as where the judgment exceeds one hundred dollars. And we see no very substantial reason why evidence that a transcript would be of no use for want of property, may not as well be allowed in one case as in the other. It was held in *Backus v. Shipherd*, 11 *Wend.* 629, that a transcript need not be filed where there is no real estate, and that the return of an execution unsatisfied is *prima facie* evidence of non-collectabillity of a debt within the exclusive

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jurisdiction of a justice. Whether the return would be *prima facie* evidence here of inability to collect, we do not decide, as the facts are found, and no such question is raised. But the law does not generally require useless proceedings, and we do not think any thing more than a justice's execution is necessary, where it appears that nothing can be reached.

The case of *Beecher v. Baldy*, 7 *Mich.* 488, decides that if a lot actually owned and occupied by a defendant in execution is worth less than fifteen hundred dollars, and is not greater in size than the law requires for exemption, it is exempt from execution without the necessity of any step on the part of the debtor. The defendant in the justice's judgment having no other real estate but such an exempted homestead, a transcript would have furnished no means for reaching it, and would have been a needless expense.

Let it be certified to the Circuit Court for the County of Ingham, that the plaintiff is entitled to judgment upon the facts found.

MARTIN CH. J., and MANNING J., concurred.

CHRISTIANCY J., did not sit in this case.

David B. Merrill and another v. Daniel Cahill.

The statute regulating the duties of millers and mill owners (*Comp. L.* §1838, *et seq.*), is meant to apply to such mills only as are in the habit of grinding for toll.

Under this statute, millers who hold themselves out to the community as millers grinding for the public generally, are bound to a similar impartiality to that required of common carriers, inn-keepers, and those following such public avocations. And it is as clearly their duty to receive grain when the mill is running, as to grind it when received.

The conversation between the person bringing grain to the mill to be ground, and the agent of the owner, who, under the owner's direction, refuses to receive the grain, is competent evidence as part of the *res gestæ*, in a suit against the owner under the statute, for such refusal.

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MERRILL *v.* CAHILL.

Where two or more persons own and run such a mill, they are all liable for a refusal to receive the grain brought to be ground, whether the refusal come from one or all such owners, or from the person in charge.

Submitted on briefs April 8d. Decided April 10th.

Case reserved from Kalamazoo Circuit.

The action was originally brought by Cahill against the plaintiffs in error, before a justice of the peace, where he declared as follows: "The said plaintiff, by Giddings & May, his attorneys, complains of the said defendants for this, that heretofore, to wit; on the 15th day of December, 1858, the said defendants were the occupants of a certain grist-mill situate and being in the township of Kalamazoo, in the county of Kalamazoo, and state of Michigan, and then and there had the control and possession thereof, and were using and running the same; and being so in the possession and occupancy of the said grist-mill, the said defendants, at the time and place aforesaid, did neglect and refuse to receive and grind in said grist-mill, a grist of said plaintiff, consisting of a large quantity of wheat, to wit: two bushels, belonging to and being the property of said plaintiff, and which said wheat was then and there offered and tendered to said defendants at the said grist-mill by said plaintiff, to be ground by them for said plaintiff.

"And the said plaintiff further avers that by reason of the neglect and refusal of said defendants to grind the wheat of said plaintiff as aforesaid, the said plaintiff was put to great trouble and expense, and to a great loss of time of himself and team in going to and from said grist-mill with the said wheat, and suffered great damage on account of the neglect and refusal of said defendants to grind said wheat, to wit: twenty dollars; to the said plaintiff's damage, in all, of twenty-five dollars, and contrary to chapter 132 of the Revised Statutes of 1846 of said state."

The defendants below demurred generally to this declaration, but the demurrer was overruled by the justice, and

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the defendants then pleaded the general issue, and the parties proceeded to trial.

Rufus Aldrich, being sworn, testified for the plaintiff below as follows: "The defendants own and carry on a grist-mill in the town of Kalamazoo, and I am in their employ at said mill, as their head miller, and I have been thus employed by them since the 7th day of May last. The plaintiff lives three or four miles from the mill, and I had been ordered by Mr. Merrill not to grind any grist for the plaintiff which he might bring to the mill. The plaintiff came to the mill a week ago last Wednesday, with a bag of wheat in a two-horse wagon. I should think it was a two bushel bag."

The plaintiff's counsel then put the following question to the witness: "What did the plaintiff say he wanted done with the wheat?"

To this the defendants' counsel objected, on the ground that no conversation between the plaintiff and witness, in the absence of the defendants, could bind or affect the defendants; which objection was overruled by the justice, and the witness proceeded as follows:

"The plaintiff said to me he wanted the wheat in his wagon ground into a grist. I told him I could not grind it. The plaintiff asked why I could not grind it. I told him I had been ordered by Mr. Merrill not to grind any grist for him. When grists are received into the mill we take them from the wagon. This wheat was not received into the mill, nor taken out of the wagon. The plaintiff asked me to grind it, and I would not. I told him I must obey instructions. I am the head miller. The mill of Merrill & Fish is nearest to plaintiff. The next mill is Walbridge's, two and a half miles distant. It is worth half a dollar to go with a team from Cahill's house to the mill of the defendants."

On cross examination the witness testified as follows: "I have never refused to grind any wheat received in the

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mill. I usually receive the wheat. I did not take this wheat from the wagon."

This being all the testimony in the case, the justice rendered judgment in favor of the plaintiff below, against the defendants below, for five dollars and fifty cents damages, and two dollars and eighty cents costs of suit; whereupon the defendants below sued out a writ of certiorari from the Circuit Court of said county, and the judge thereof reserved the following questions for the opinion of the Supreme Court.

1st: Is the declaration good, under general demurrer, under the Justice's Act?

2d: If not, did the defendants waive the objection by pleading over and going to trial on the merits?

3d: Was the objection to the admission of the conversation between the plaintiff and the witness well taken?

4th: Does the statute on which the action was grounded oblige the miller to grind every grist that is taken to his mill, *whether he consents to receive the grist or not;* or does it require him to use reasonable diligence in grinding in the order in which grists are *actually received*, according to his ability and the capacity of his mill and machinery; leaving it discretionary with the miller to receive or refuse the proffered grist?

5th: When the mill is running and able to do business, may the miller refuse to receive grain for grinding, without subjecting himself to an action under the statute?

6th: If the mill is not running, but in a condition to run, may the miller refuse to receive grists and not subject himself to an action?

7th: When the mill is owned or conducted by two or more, will the refusal of one to receive a grist subject all to an action?

H. Mower, for plaintiffs in error:

As defendant in error has no remedy, except under the

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statute, the cause of action arising under the statute must be specially stated:—4 *Johns.* 197. The statute affixes a penalty only in three cases: for not well and sufficiently grinding any grain; for not well and sufficiently grinding the grain in due time, and for taking illegal toll. The declaration does not allege the default of the defendants in either of these particulars.

The evidence of the conversation between the plaintiff below and the witness, was improperly received; for if it was penal not to receive the grain, then the witness was liable, and could not throw his guilt on any one else. If a master command a servant to do an illegal act, he can not justify himself by the command:—*Reeves Dom. Rel.* 357. The admissions of the agent are evidence against the principal only while doing some *lawful* act within the scope of his agency.

Under the proof, no judgment should have been rendered against Fish. One partner is not liable for the torts of his co-partner, unless he was privy to them:—*Coll. on Part.* § 457; *Story on Part.* § 168; 2 *Comst.* 616; 6 *Mass.* 245; 5 *Greenl.* 295.

Giddings & May, for defendants in error:

The declaration containing a substantial statement of a cause of action, must be held sufficient:—1 *Mich.* 352; 3 *Mich.* 460.

The witness being the agent of defendants, and actually carrying on their mill, as such agent stood in their place. What he said was their saying, and what he did was their doing. What he said, as well as what the plaintiff said, if it constituted a part of the transaction of bringing or delivering the grain at the mill, and the intent of such delivery or bringing, and of the neglect or refusal to grind, is part of the *res gestæ*, and as such, what was said between the plaintiff and the witness, who was the agent of defendants, was admissible in evidence:—9 *Cow.* 205; 1 *Greenl. Ev.* § 113.

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It is not necessary that the owners should be present, refusing or neglecting in person, in order to make them liable under the statute. It is sufficient that they or their agents neglect to grind when brought. The statute would be rendered nugatory if the rights of the public must depend upon the will of the owner to receive or refuse to receive, and by his neglect or refusal to receive the grain, he could evade the express provisions of the law requiring him to grind the grain when brought.

CAMPBELL J.:

The principal inquiry necessary in this case, is concerning the meaning of the statute regulating the duties of millers and mill-owners.

On comparing the various sections of the statute, it is apparent that it is meant to apply to such mills as are in the habit of grinding for toll. After fixing the rates of toll for grinding various grains, the law provides that, "the owner or occupier of any grist-mill shall well and sufficiently grind the grain brought to his mill for that purpose, in due time, and in the order in which it shall be received;" saving however the right to the mill-owner to grind his own grain at all times. The statute also provides that any "miller or owner or occupant of a grist-mill, who shall not well and sufficiently grind any grain as aforesaid, or not in due time as the same shall be brought," &c., shall be liable to five dollars damages above the actual damage.

While the law does not turn every flouring-mill into a custom-mill, it is, we think, very clearly designed to compel those persons who undertake to hold themselves out to the community as millers, grinding for the public generally, to a similar impartiality to that required of common carriers, inn-keepers, and those following such public avocations. There is as clear a duty to receive grain, when the mill is running, as there is to grind it when received. The

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duty is to grind grain *brought* to the mill in the order of its receipt. To allow a miller to refuse to receive it when brought, would enable him to evade the statute entirely. Whether any duty attaches when the running of the mill has been discontinued for any thing more than a temporary purpose, does not properly arise in this case. But when a mill is in running order, and in actual employment from day to day in custom work, we think the statute applies, and forbids any partiality.

The declaration is, we think, entirely clear and certain, and conforms fully to the sense of the statute.

The conversation between the plaintiff and the miller was a part of the *res gestæ:* as such it was properly admitted.

As this is a civil private action, and the liability created by the statute is to private damages, we think it makes no difference whether the refusal to receive the grain comes from one or all of the owners, or from the person in charge. They are bound to see that every customer is properly treated. Their case is like that of a vessel-owner or other common carrier, who is responsible for his agents as well as for his own acts. Mill-owners would otherwise find it very easy to escape any liability whatever.

Let it be certified to the Circuit Court for the county of Kalamazoo, that the declaration is sufficient; that the statute applies to refusal to receive grain, as well as to refusal or neglect to grind it, and that when a mill is running and is used for general custom work, the miller can not refuse to receive the grain of a particular person. Also that the conversation proved was properly received in evidence. The other questions we decline answering.

MANNING and CHRISTIANCY JJ., concurred.

MARTIN CH. J., did not sit in this case.

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Richard Elliott v. Owen Dudley.

A Circuit Judge has no jurisdiction of proceedings for the commitment of a defendant, in exoneration of special bail, unless copies of the bail piece are presented to him, as the basis of his action, as required by the statute. It is not sufficient that copies of the recognizance of special bail are presented, instead of the bail piece.

Heard April 6th. Decided April 11th.

Certiorari to the Circuit Judge of the Seventh Judicial Circuit.

From the return to the certiorari, it appears that on the thirty-first day of January, 1859, there was presented to the Circuit Judge of said seventh circuit, two certified copies of the recognizance of special bail, taken May 3, 1856, in a cause pending in the Circuit Court for the county of Ingham, between Richard Elliott, as plaintiff, and Owen Dudley, as defendant, entered into by Horace Green and John O. Hinkley, conditioned that if the defendant should be condemned in said action, he should pay the judgment, or render himself into the custody of the sheriff of Ingham, for the same, and if he failed so to do, the sureties should pay the judgment for him. Upon one of these certified copies, said Circuit Judge endorsed an order that said Dudley be committed to the custody of the sheriff of Ingham county, in exoneration of his bail.

August 5th, 1859, on a certificate of the sheriff of Ingham county being presented to said Circuit Judge, showing that on February 8th, 1859, said Dudley was committed in pursuance of the before mentioned order, the Judge made a further order, citing said Elliot to appear before him the fourth Tuesday of August, 1859, to show cause why said bail should not be exonerated from their liability as such. On which day the parties respectively appeared, and said Elliott objected, among other things:

1. This is a cause pending in the fourth judicial circuit, and the Judge of the seventh circuit can have no jurisdic-

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tion or power in the matter, without cause affirmatively shown.

2. The original surrender was not made upon a copy of the bail piece, as required by statute; and the omission is not explained.

The said Circuit Judge notwithstanding made an order that said sureties be discharged and exonerated from all liability as such sureties, and Elliott sued out this writ of certiorari.

J. W. Longyear, for plaintiff in error.

A. & E. Gould, for defendant in error.

CHRISTIANCY J.:

Several errors are assigned in this cause, but as the second is sufficient to dispose of the cause for want of jurisdiction, we do not propose to express an opinion upon the others.

Whether the Circuit Judge of the seventh judicial circuit could, within his own circuit, take jurisdiction of the proceedings for the discharge of bail upon a surrender of the principal, in an action pending in the fourth judicial circuit, is a question which admits of much doubt. The language of the statute (*Comp. L.* § 4152), if not limited by the nature of the proceedings or the objects of the jurisdiction, is broad enough to admit of a construction conferring the power. But we have been wholly unable to discover any reason in the nature of the proceedings, or the object to be attained by them, which would call for such an enactment, or *require* such a construction. Considered with reference to the reasons for the proceeding, and the rights and convenience of parties, there would seem to be very strong reasons for confining the jurisdiction of the Circuit Judges in such cases to their respective circuits. And the bail may always take the principal into the circuit where the action is pending, by virtue of

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the bail piece alone, in every case where the order of a Judge would authorize him to be taken there and delivered to the sheriff.

But conceding the power of the Judge of the seventh circuit to take cognizance, within his own circuit, of the proceedings for the surrender of the defendant, and the discharge of his special bail, in an action pending in the fourth circuit, did he acquire jurisdiction of those proceedings in this particular case?

The whole proceeding for the surrender of a defendant by his bail in a civil cause, and for their discharge in consequence of such surrender, is special, regulated by, and entirely dependent upon the statute. The officer before whom the proceedings take place has no authority except what the statute gives him. And if the case presented does not come within all the requisites prescribed by the statute, he has no jurisdiction. And every thing necessary to confer jurisdiction must affirmatively appear upon the record.—*Wight v. Warner*, 1 *Doug. Mich.* 384; *Clark v. Holmes*, *Ibid.* 390; *Chandler v. Nash*, 5 *Mich.* 409.

The statute (*Comp. L.* § 4153) provides that "the proceedings to effect such surrender shall be as follows:" and then proceeds to establish specifically and minutely the mode of proceeding, and among other things requires:

1st. That "there shall be produced to the officer" two copies of the "*bail piece*," upon one of which his order of commitment is required to be endorsed. 2d. That the order discharging the bail (when granted) shall be endorsed on the second copy "of the *bail piece*." 3d. That this last copy of the "*bail piece*," with the proceedings and order endorsed thereon, and having attached to it the certificate of the sheriff, &c., "shall be immediately filed in the office of the clerk of the court; and until so filed the liability of the bail shall continue."

If the statute had left it in doubt, whether the "recognizance of special bail" might or might not be the

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instrument referred to, as the "*bail piece*," or if it had not clearly distinguished between them, there might possibly be some ground for contending that copies of the "*recognizance*" might satisfy the statute requirement of copies of the "*bail piece*."

But the statute (*Comp. L.* §§ 4134 and 4135) very clearly distinguishes between the two instruments; gives, *in extenso*, the form of each, and declares that each shall be in substance in the form which it prescribes. And so far from being identical, either in form or substance, they are entirely different in both. The recognizance is a written acknowledgment, before an officer, of the liability of the bail to the plaintiff in a certain contingency, and for the plaintiff's benefit; and is to be filed in the court where the action is pending. The bail piece is an instrument which the bail have a right to demand of the officer taking the recognizance, stating that the principal is delivered to the bail. It is the evidence of their right to his custody; it is delivered to them, and not filed in court, unless upon a surrender of the principal as above stated. There is therefore, no possible ground for confounding the identity of the two instruments, nor for supposing the Legislature, when they mentioned the one, intended the other. The language which requires these proceedings to be upon the "*bail piece*" is entirely consistent with the whole scope of the statute, and too plain, positive and unambiguous, to admit of any construction. To say that copies of the recognizance might serve as an equally safe basis of these proceedings, is to use an argument which might have been very legitimate before the Legislature who enacted the statute, but which can have no weight with the judiciary whose province is to declare, and not to make the law.

If the Judge, in the case now before us, could proceed upon the copies of the recognizance, instead of the bail piece, it is difficult to see why the same latitude of construction would not authorize him to dispense with both,

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and to proceed upon a copy of the capias and parol evidence.

As no copy of the bail piece was produced to him in any stage of the proceedings, his jurisdiction, we think, never attached, and all the proceedings before him were void.

The other Justices concurred.

Charles A. Holmes v. Frederick Hall and another.

An instrument in writing, deliberately adopted by the parties, must stand as written, although the parties may have mistaken its legal intent.

A writing, given by a debtor to his surety for the debt, providing that on the failure of the debtor to pay the debt within thirty days, the said surety might take immediate possession of the goods, &c., in possession of the debtor, in the store and premises occupied by him, and out of the same to sell so much as will pay the debt, and a reasonable compensation for his services, and re-deliver the balance to the debtor, is not a mortgage, for it does not purport to change in any way the title to the property.

Neither is such an instrument a pledge—no possession being given with it.

Such an instrument is a mere naked power, not coupled with any present interest, and can not operate to give the surety any rights in the property itself until reduced to possession. And, therefore, the lien of an attachment levied before possession taken under such instrument, must prevail over it.

Heard April 5th. Decided April 11th.

Error to Shiawassee Circuit, to which the cause had been transferred by stipulation from Ionia.

The action was trespass, for the taking by defendants in error of certain personal property which plaintiff claimed to have taken, and to be entitled to hold, as sheriff of Ionia county, by virtue of several writs of attachment to him directed and delivered, against the goods, &c., of Hiram T. Barstow, and Henry A. Nash, tested in April and May 1857.

The defendants justified taking the goods under an instrument of which the following is a copy, and which was signed by Barstow and Nash.

"Whereas, Frederick Hall and Stephen F. Page have

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signed with us, for our benefit, two certain promisory notes of $1,738 14 each, with interest, said notes bearing date February 4th, 1854, and payable one in fourteen months and one in eighteen months from the date thereof, to Louis S. Lovell, administrator on the estate of John C. Ball, deceased, or order. Now to save the said Frederick Hall, and Stephen F. Page, harmless from the payment of said notes or any part thereof, we hereby agree with said Hall and Page, to pay each of said notes within thirty days from this date, and in default thereof, we hereby authorize said Hall and Page, or their certain agent or attorneys, to take immediate possession of all the goods, wares and merchandise, lumber and shingles, and the personal property, now in our possession and belonging to us, now in and about the store and premises in the village of Ionia, county seat of Ionia county, Michigan, occupied by us as merchants under name and firm of Barstow & Nash, and all notes and accounts, and account books, belonging to us as merchants aforesaid, and the buildings and premises which we may be doing business in, in selling goods, and authorize them out of such property, so taken possession of, to sell so much thereof as will pay the above described notes, and them a reasonable compensation for their services in selling the same, and the balance to re-deliver to us." Which paper was dated February 23d, 1857.

It appeared on the trial, that on February 4th, 1854, Barstow & Nash purchased of said Lovell, administrator as aforesaid, a stock of goods, for the purchase price of which they gave four promissory notes, signed by themselves, with defendants as sureties, for $1,738 14 each, and that to indemnify defendants for signing said notes, Barstow & Nash gave them security upon such stock of goods in a writing, of which the one above copied is an exact copy, except the date and number of notes described, and also a bond and mortgage on real estate in Ionia;

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that Barstow & Nash were not indebted at the time, except for said purchase; that on February 23d, 1857, there remained unpaid the two last of the said notes, except the interest, and the said security to defendants was supposed to have expired and become of no effect as to creditors, and for that reason, the instrument under which defendants justify was given to indemnify said defendants for their remaining liability: that at the time of the taking of the goods by the defendants, from the plaintiff, one of said last two notes had been taken up by Barstow & Nash, and there was unpaid on the other $1,742.

Plaintiff, in reply, proved that defendants never had possession of the goods, &c., under the last mentioned writing, until they took them from plaintiff's possession after the attachments, and that the demands of the several attachment creditors against Barstow & Nash, accrued before February 23d, 1857.

The Circuit Judge charged the jury that the said writing, given by Barstow & Nash to defendants, was a mortgage, and, as such, good and effectual against the creditors of Barstow & Nash, without actual possession of the property covered thereby, provided the jury should find that the same was executed in good faith, and without any intention to defraud the creditors of Barstow & Nash.

The jury under this charge found a verdict for defendants, and the plaintiff brought error.

J. W. Longyear, and *C. I. Walker*, for plaintiff in error:

The writing in question is not a *mortgage*, but merely an agreement to pledge the property referred to in a certain contingency. There is no transfer of property, no conveyance of an estate, no pledge. It is a mere power to take possession and dispose of so much as may be necessary to imdemnify defendants, and no more: the general property as well as the possession remained in Barstow & Nash. It is not even a *lien*, because a lien can not

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be created by an executory agreement: — *Story on Bailm.* § 287; 2 *Story Eq. Juris.* § 1030; 33 *Eng. L. & Eq.* 413; 6 *Ired.* 309; 3 *Barr*, 208; 40 *Me.* 412; 5 *Flor.* 373; 4 *Barb.* 491; 2 *Barb.* 538. It is clearly not a sale; and it is not a pledge, for possession is the essence of a pledge.

Bell & Soule, for defendants in error:

Upon principle, the instrument is a mortgage, because the parties intended it as such: — 4 *Kent*, 138; 10 *N. H.* 305; 29 *Me.* 346. Upon authority, also, it is a mortgage: — 9 *Wend.* 80; 10 *Vt.* 79; 4 *N. Y.* 497; 9 *Barb.* 630; 16 *Barb.* 613; 11 *Texas*, 478.

Even considered as a power, the right of defendants to take possession under this instrument was complete at the end of thirty days, and an attaching creditor can acquire, through his attachment, no higher or better rights than the defendants in the attachment had. — *Drake on Attach.* 220. The right of defendants could not be defeated without the aid of a presumption or proof of fraud, and the question of fraud has been settled by the verdict of the jury in favor of defendants: — 6 *Conn.* 281; *Com. on Sales*, 25, 258; *Brown on Sales*, 3, 10, 11, 353.

CAMPBELL J.:

The whole of this case depends upon the nature of the instrument, executed by Barstow & Nash, to Hall & Page, which was held by the court below to be a valid chattel mortgage.

The instrument bears a close resemblance to the one considered by the Supreme Court of the United States, in the case of *Hunt v. Rousmanier*, 8 *Wheat.* 174, and again in *Hunt v. Rousmanier's Adm.* 1 *Peters*, 1. It was decided in the latter case, that even in equity, an instrument must stand as written, if deliberately adopted by the parties, although they mistook its legal intent; the mistake being one of law merely; and especially so when the rights of

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creditors intervene. We are bound therefore to look for the intent of this agreement to the paper itself, and not beyond it.

It is not a pledge, because there was no possession given; and it is not a mortgage, for it does not purport to change, in any way, the title to the property, which was to remain throughout in the makers. It is nothing but a naked power, not coupled with any present interest, and which could never operate to give Hall & Page any rights in the property itself, until reduced to possession. The levy having been made before this, and while the entire title was in the attachment debtors, must prevail over it.

The court below erred in holding the instrument valid as a mortgage, and the judgment must therefore be reversed, and a new trial granted.

The other Justices concurred.

In the Matter of Charles Mason.

Under the statute which requires courts sentencing offenders to the State Reform School to certify to the keeper thereof the age of the person sentenced, as nearly as can be ascertained by testimony, the court having certified the age of a convict to be under sixteen years, must be conclusively presumed, so far as all collateral inquiries are concerned, to have performed its duty; and the Supreme Court cannot assume or inquire, on *Habeas Corpus*, whether other than legal evidence was admitted on this question.

A prisoner having been sentenced and committed to the Reform School, as under sixteen years of age, the court sentencing him can not, on the ground of a mistake as to the prisoner's age, proceed to give a new sentence. The sentence is not made void by such mistake.

The Recorder of Detroit has no authority to issue a *Habeas Corpus* to take a prisoner from the Reform School, who has been lawfully sentenced there, unless to testify as a witness.

Where it appears, in return to a writ of *Habeas Corpus*, that the prisoner is held by an officer who has no legal authority for the purpose, but that there is authority in the keeper of the State Reform School to detain him, under a legal commitment from which he has not been properly discharged, the court will not order him released, but will remand him to the custody of the keeper of the Reform School.

Heard April 10th. *Decided April* 11th.

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MATTER OF CHARLES MASON.

Habeas Corpus.

The petition set forth that petitioner on August 27th, 1859, was convicted in the Recorder's Court of Detroit, of larceny in a dwelling house, and sentenced to the House of Correction (now State Reform School) until he should arrive at the age of twenty-one years; that he was taken to said House of Correction in pursuance of said sentence, and remained there until March 10th, 1860; that on March 7th, 1860, the prosecuting attorney of Wayne filed an application in said Recorder's court, setting forth the said conviction and sentence, and further setting forth, that at the time of said sentence petitioner was in fact of the age of twenty years; and asking that an order or other proper process might issue from said Recorder's court, to bring petitioner before such court, that his age might be inquired into and ascertained, in order that he might be again remanded to said House of Correction, or sentenced to the State Prison; that an order was made by said court accordingly, in pursuance of which petitioner was taken from the House of Correction, and committed to the Wayne county jail, where he is now confined, awaiting the action of said Recorder's Court in sentencing him to the State Prison. The petitioner further set forth that he was in fact twenty years of age at the time of said conviction; and he alleges the present confinement to be entirely illegal.

The writ having been issued as prayed, the sheriff of Wayne county returned thereto: that on March 8th, 1860, the following writ was issued by the Recorders court:

"To the superintendant of the State Reform School, of the State of Michigan, Greeting: In the name of the People of the State of Michigan, we command you, that you have the body of Charles Mason, by you imprisoned and detained, as it is said, before the Recorder's Court of the city of Detroit, in the State of Michigan, on Monday, the nineteenth day of March, in the year of our Lord one thousand eight hundred and sixty, to do and receive what shall then and

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there by the said court be ordered and adjudged; and of this writ make due return. Witness the Honorable Henry A. Morrow, Recorder of the city of Detroit, this eighth day of March, in the year 1860. HENRY STARKEY,

[SEAL.] *Clerk of the Recorder's Court.*"

To which writ, Theodore Foster, superintendant and keeper of said State Reform School, returned as his authority for retaining the petitioner, the conviction and sentence of the Recorder's Court set forth in the petition.

And the respondent further returned to the present writ that at the time of the service of the above writ on said Foster, respondent brought petititioner from said Reform School, and now holds and detains him to await the action of said Recorder's Court.

C. E. Eddie, and *H. D. Terry*, for petitioner, now moved for his discharge. They contended that the Recorder's *Court* could not issue a writ of Habeas Corpus, though the *Recorder* might. And further, that the court having once passed sentence, had no power for any cause to bring the defendant before it for sentence anew. Under the statute, the fact of defendant's age is one to be determined judicially before sentence; and having been passed upon, is now *res judicata*, and can not be reviewed:— 1 *Park. Cr. R.* 374; 8 *Eng.* 100. The original sentence was therefore valid, but under it, by the express provisions of the statute, petitioner could not be detained in the House of Correction after he arrived at the age of twenty-one. He has now arrived at that age, as appears by his petition, which, not being denied by the return, is to be taken as true.

J. M. Howard, Attorney General, contra, admitted that the Recorder's Court had no power to bring the prisoner before it to review or change its sentence, but he contended that the judgment and sentence were conclusive

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on the question of petitioner's age, and he must therefore be remanded to the Reform School, to undergo the sentence.

CAMPBELL J.:

A *habeas corpus* having been issued to the sheriff of Wayne county, to inquire into the cause of detention of the relator, it appears that in August, 1859, he was sentenced to the State Reform School, as under sixteen years of age, and that the Recorder of Detroit, who sentenced him, has recently issued a precept or writ, of a somewhat anomalous character, whereby he has been brought back from that institution, and is now in the hands of the sheriff of Wayne county.

The relator now claims, that his imprisonment in the Wayne county jail is illegal, and that he was in fact more than sixteen years old when sentenced.

The first question that arises is, whether the action of the Recorder, in sentencing the relator, was legal. The law requires the court to ascertain, by testimony, the age of the person committed, as near as may be, and certify it to the keeper of the Reform School, with the sentence. Having certified the supposed age of the relator, with his sentence, the Recorder must be presumed conclusively, so far as all collateral inquiries are concerned, to have done his duty. We have no right to assume, or even to inquire, in this proceeding, whether he allowed the statements of the accused, or any other than legal evidence, to guide him. This is not the proper manner in which to review such finding, if it be subject to review. He has no right now to give a new sentence; and the old one is undoubtedly a legal and valid commitment. If he made a mistake in the prisoner's age, it does not vitiate the sentence.

Without inquiring into the authority of the Recorder to issue a *habeas corpus* in any case, to be served out of the city or county, the writ which he actually issued is

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void. He could not take a prisoner out of the Reform School, who has been lawfully sentenced there, unless to testify as a witness. The sheriff of Wayne county can not lawfully hold him in obedience to such a writ.

The question next arises, whether the relator is entitled to a discharge altogether. He claims that his allegations in the petition for a writ of *habeas corpus*, not being controverted, must be taken as true; and that, if true, they show his sentence to have expired.

This is not so. The object of a writ is to require the person who answers it to show upon what authority he detains the prisoner. The return shows, not indeed any authority in the sheriff of Wayne county to hold him, but an authority in the keeper of the Reform School to hold him, under a legal commitment from which he has not been lawfully discharged. The prisoner may, under section 5239, deny the truth of the return, or establish his right to a discharge by facts; but until he does so, the return showing sufficient cause, and being admitted to be true, will prevail. He has not shown that his term of imprisonment has expired. He has not even alleged it.

As he has been legally committed for a criminal offense, it is our duty to remand him to the proper custody, which is that of the keeper of the State School of Reform, at Lansing, to be held under his original sentence, which is set forth in the return: — 2 *Comp. L.* §§ 5234, 5235.

The other Justices concurred.

Hugh H. Wright v. Owen Dudley and others.

Where an appeal is taken in Chancery, in a case in which the witnesses were examined in open court, the proper course for the party desiring the testimony to be certified to the Supreme Court, under the statute, is to make a case setting it forth, present it to the Circuit Judge, and procure his order, fixing the time and place when and where it shall be settled, and for notice to the opposite party, that he may attend and propose amendments; or, instead thereof, take other equivalent proceedings.

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WRIGHT v. DUDLEY.

Where no proceedings are taken for the settling of such a case, but the party appellant, without notice to the opposite party, procures and files with the appeal papers a certified copy of the Judge's minutes of the evidence taken on the trial, such copy can not be treated as a case made under the statute, or considered in this court on the hearing.

Either of the parties has the right to procure such a case to be settled; and, if the appeal is regularly taken, and neither party take steps to have a case made and settled, the cause will stand for hearing without the testimony, and it will then devolve upon the appellant to show that the decree is not warranted by the pleadings—the presumption being that there was evidence below to authorize it.

The statute allowing three months after trial for the making of such a case, will be construed to allow three months from the time decree is made.

Heard April 10th. Decided April 11th.

Appeal in Chancery from Shiawassee Circuit.

A. Gould, for complainant, who is appellee, moved to have the appeal dismissed, because the appellants had failed to cause a case, embodying the testimony, to be made and settled under § 3511 of Compiled Laws.

From the papers in support of the motion, it appeared that the cause was heard in the court below November 12th, 1858, on proofs taken in open court, and decree made as prayed by complainant, February 6th, 1859; that an appeal was regularly taken to this court, and return made to the appeal, but no case setting forth the evidence at large had been made and settled before the Judge who tried the case, though without notice to the solicitors for the appelee, the appellant had procured from said Judge and filed in this court, a copy of the Judge's minutes of the testimony taken on the trial, certified by such Judge.

The motion to dismiss was noticed for the January term, but stood over to this term by consent of parties.

H. McCurdy, for appellant, claimed that if the copy of the judge's minutes was not a case regularly settled under the statute, the defect was at most a mere irregularity, which the appellee should have taken advantage of at the first opportunity; and that he waived his right to do so by neglect to move at the last October term, previous to which time return had been made to the appeal, and the appellee notified thereof.

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WRIGHT v. DUDLEY.

THE CHIEF JUSTICE:

This being an appeal from a decree in Chancery, in a case in which the witnesses were examined in open court, the only way in which it can be tried here upon the facts, is upon a case made and settled as prescribed in §3511 of Compiled Laws, which provides that "in case any cause in Chancery shall be so tried in open court, either party shall be entitled to make and settle a case, setting forth the evidence at large before the Judge who tried the same, at such time and in such manner as said Judge shall direct, or as shall be prescribed by the rules of said court; and upon the making and filing of such case within three months after such trial, the same shall be taken and deemed to be the evidence in said cause, to the same extent and with like effect as if the said testimony had been taken before a Circuit Court Commissioner, and certified by him."

There is no such case before us, but the Circuit Judge has transmitted instead a certified copy of his minutes of the testimony exhibited before him. The obvious intention of the statute, is to confer upon parties the right to settle a case, setting forth the evidence given in the court below, for the consideration of this court in the hearing upon appeal, to avoid the omissions and misapprehensions of the Circuit Judge, which might easily occur in the haste and perplexities of the trial before him. Certainly we have no more authority to consider his minutes of the testimony than those of counsel.

The proper course in this class of cases, is for the party desiring the testimony to be certified to us, to make a case setting it forth, present it to the Circuit Judge, and procure his order, fixing the time and place when and where it shall be settled, and for notice to the opposite party, that he may attend and propose amendments; or instead thereof to take other proceedings equivalent. The practice should be assimilated, as near as may be, to that of making cases

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for review at law. This course will secure to each party a full opportunity to have the testimony exhibited in this court substantially, if not literally, the same as that exhibited below.

This motion is made to docket and dismiss the appeal for want of such a case. This we think to be irregular. The appeal has been regularly taken, and if neither party desires it to be heard upon pleadings and proofs, but they are content to submit it without the testimony exhibited below, we think they may do so. But as we construe this section of the statute, either party may initiate proceedings for making and settling a case. If neither does it, and the case is brought to a hearing, it will necessarily devolve upon the appellant to show that the decree is not warranted by the pleadings; the presumption being that there was evidence below to authorize it.

Motion denied without costs.

Gould, suggested a difficulty in this statute, that it required the case to be made and settled within three months *after the trial;* and the cause might not be decided within that time.

THE CHIEF JUSTICE:

We must construe the statute to mean three months after the trial is concluded by decree.

John M. Wattles v. John Warren and another.

The County Courts, as they existed in 1848, had jurisdiction of actions of ejectment.

The general statute regulating proceedings in ejectment, was applicable to the County Courts, except so far as the proceedings marked out by it were inconsistent with the summary proceedings prescribed for the County Courts.

Heard April 4th. Decided April 11th.

Error to Lapeer Circuit.

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The action was ejectment, originally brought in the County Court of Lapeer county, April 21st, 1848, and from thence, after judgment for the defendants, removed to the Circuit Court by certiorari, November 23d, 1848, where the judgment of the County Court was affirmed.

The position taken in this court, was that the County Courts had no jurisdiction of actions of ejectment; the statute attempting to confer it not prescribing any mode of proceeding by which the jurisdiction could be exercised.

M. Wisner, for plaintiff in error.

T. Romeyn, for defendants in error.

MANNING J.:

We have no doubt as to the jurisdiction of the County Court. The statute is clear on that point: — *S. L.*, 1848, *p.* 263, §§ 4 and 5. And to enable the court to exercise the jurisdiction, it was not necessary the statute giving it should regulate the mode of procedure. The statute relative to actions of ejectment (*Comp. L.*, *p.* 1229), is general in its character, and was therefore applicable to the County Courts, except so far as the proceedings marked out by it were inconsistent with the summary proceedings prescribed by statute for the County Courts.

The judgment must be affirmed.

The other Justices concurred.

The People v. Charles Jackson.

The Recorder's Court of Detroit cannot reserve, for the opinion of the Supreme Court, questions arising upon the trial of offenses against city ordinances.

Heard April 10th. Decided April 12th.

The defendant was convicted in the Recorder's Court

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of Detroit, on a complaint under an ordinance of said city, for obstructing a public alley. On motion being made for a new trial, based upon certain exceptions taken to the rulings of the court, the Recorder reserved the questions arising on such motion for the opinion of this court.

A. Russell, for the prosecution, now moved to dismiss the case, on the ground that the Recorder's Court has no power to reserve for the opinion of this court, questions in cases arising under city ordinances. The Recorder's Court is to be kept within its jurisdiction in such cases by certiorari, as was the old Mayor's court, from which in respect to the trial of city cases the Recorder's Court in no wise differs: — 2 *Doug. Mich.* 334; *Ibid.* 77. See also, 4 *Mich.* 592, *and cases cited;* opinion of *Martin Ch. J.*, in *People v. Police Justice*, 7 *Mich.* Abuse of authority can be reached by *trespass*, as in 2 *Doug. Mich.* 332; or by *injunction*, as in *Har. Ch.* 98.

Holbrook & Bishop, contra.

The Recorder's Court has general jurisdiction of all offenses under state laws, that may be committed in the city of Detroit, except cases cognizable in the Police court and by justices of the peace. It has also exclusive jurisdiction of all offenses against the ordinances of the city. All prosecutions are to be in the name of the People, and all trials the same as on indictment. Trials for offenses against city ordinances being thus assimilated to trials for offenses against the state laws, both in that court and in the Circuit Courts, an intent is apparent to remove all substantial difference between them, if in fact any difference ever existed. In fact no substantial difference exists, except in degree, between the various violations of penal laws.

The defendant is entitled to have the proceedings, at any time before or after judgment, removed to the Supreme Court, by writ of error or other process in the same manner

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that like proceedings may be from the Circuit Courts: — *S. L.*, 1857, *p.* 113, §24. Removing *in the same manner* must include all authorized modes of removal from Circuit Courts, and *like proceedings*, must refer to all criminal prosecutions in the Circuits. The words "other process" in the charter, are synonymous with the words "other modes" or "other means." — 3 *Black. Com.* 379; 2 *Bouv. L. Dic.* 387, "*Process, Practice,*" "*Process, Rights;*" 2 *East*, 213, 221; 1 *Paine C. C.* 368. Under the definition given by Blackstone, any mode of commencing a suit, and any mode of transferring a case from one court to another, is *process.* In the Roman law, the word *process* had the same signification as the term *action at law. Introduction to Justin.* 61, 62, 72, 76. And substantially the same in the French law.

THE CHIEF JUSTICE:

Although the Recorder of Detroit may have power to reserve for our opinion questions which arise upon the trial of offenses against the general laws of the state, he has none to reserve such as arise upon the trial of complaints for the breach of city ordinances.

In the last instance, he acts in the capacity of a municipal officer simply, and in the enforcement of laws of which we can not take judicial cognizance; while in the first instance he acts under general laws, and exercises the power of a Circuit Judge. It is only then, when he acts in this latter capacity, that he can reserve questions — the statute only conferring that power upon Circuit Judges.

The charter, in prescribing the manner in which trials shall be conducted in his court, merely regulated the practice therein. It conferred no power independent of this. Although causes may be removed into this court from the Recorder's Court, as they may be from the Circuit Court, yet the reservation of questions for our opinion is in no sense a removal of the cause. It remains below. We can

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render no judgment, nor can we make any order in it. Our powers are merely advisory.

The case must be dismissed.

William S. Maynard v. Thomas J. Hoskins and others.

A copy of the bond given on appeal in chancery, should be sent up by the Register with the record. It is not sufficient that the Register certifies that an appeal bond was duly approved and filed.

This court will not dismiss an appeal duly taken, for a failure of the Register to send up a copy of the appeal bond; but a further return will be ordered for the purpose of bringing it up.

Heard and decided April 17th.

Jacob Jennings v. The People.

Under the statute (§5811 of Comp. L.) which provides that "the lawful existence of any bank out of this state shall be presumed upon evidence that such bank is actually engaged in the business of a bank, "evidence of general reputation in the community of the existence of a bank in another state, and that its bills pass current from hand to hand in the business transactions of the day, is admissible as tending to show that there was *de facto* a bank "engaged in the business of a bank."

Such evidence being admissible, its weight is for the jury; and it is not error for a court to charge that, if the jury are satisfied from such testimony that there was such a bank, it would be sufficient evidence to establish that fact.

Heard April 4th. Decided April 18th.

Error to the Recorder's Court of Detroit.

The defendant was charged, by information, with having, on the first day of March, 1860, at the city of Detroit, uttered and passed as true, to one Arthur Gore, a certain false, forged, and counterfeit bank bill, of the denomination of two dollars, payable to the bearer thereof on demand, purporting to be issued by the Agricultural Bank, an incorporated banking company in the state of Illinois, and engaged in the business of a bank in that state, with intent, &c.

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On the trial, the prosecution having proved the uttering of the bill, called David Preston, a banker of Detroit, who testified that he had knowledge of the difference in the appearance of true and counterfeit bills on said bank, and that the bill in question was counterfeit: that he was not acquainted with the signatures of the president or cashier of said bank: that he had frequently seen bills purporting to be issued by such bank, and that they were received as money in the commercial transactions of the state: that he did not know there was any such bank beyond the mere knowledge which he had that its bills were in general circulation and received as current, and from information received from correspondents in Chicago: that the witness was in the habit of receiving and paying out the bills of that bank. Albert Ives, a teller in a bank in Detroit, also testified that bills of the bank in question were current, and received in the daily transactions of business.

The Recorder was requested by defendant's counsel to charge the jury, that unless there was evidence to show the actual existence of said Agricultural Bank, or that said bank was actually engaged in the business of a bank, at about the time of the alleged uttering by the prisoner, they must acquit him. The Recorder declined this request, but charged among other things, that in order to convict the prisoner the jury must be satisfied from the testimony that the said Agricultural Bank was in existence, and doing business as a bank, and that the bill in question was a counterfeit on said bank, and that the prisoner knowing it to be such, had passed it intending to defraud. But that general reputation in the community of its existence, and the fact that its bills are passing current from hand to hand in the business transactions of the day, were sufficient evidence of the existence of the bank for the consideration of the jury, and if they were satisfied from such evidence that there was such a bank, it would be suf-

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ficient evidence to establish that fact. To this charge exception was taken, and the prisoner, having been convicted, brought the case to this court by writ of error.

W. Jennison, Jr., for plaintiff in error:

The prosecutor having undertaken to describe the bill in a material point, must prove it; and even had he not done so, some proof would have been required to show the legal issuing of the notes:—6 *Yerg.* 346; 5 *Cush.* 606; 2 *Russ. on Cr.* 688; 1 *Greenl. Ev.* § 65. The incorporation of a bank gives value to its notes. It is that which makes them bank notes; without it, they would be worthless. Were no such bank in existence, the passing of bills purporting to be issued by it would involve no criminality under our statutes. In every point of view, the allegation was a material one. The legality of a reputed bank can not be presumed by the court in a civil case: *a fortiori* in a criminal case:—12 *Ohio*, 150; 15 *Wend.* 314.

The information charges defendant with uttering a counterfeit bill, purporting [to be issued by an incorporated bank in Illinois engaged in the business of a bank in said state. The only proof of the existence of the bank was, that the bills circulated in the state, and were reputed to be issued by the Agricultural Bank. We contend, therefore, that upon general principles of law, as well as under the statutes of Michigan, there was no legal evidence of the existence of the Agricultural Bank:—2 *Greenl. Ev.* § 113; *Thatcher's C. C.* 67; 2 *Pick.* 47; 5 *N. H.* 367; 5 *Mich.* 244; 5 *Cush.* 606; 6 *Yerg.* 345; 21 *Wend.* 312; 25 *Wend.* 472; 1 *Spencer*, 401; 12 *Wend.* 547; 1 *Park. Cr. R.* 469; 2 *Ibid.* 163; 2 *Brev.* 1; 3 *Brev.* 507; 2 *Hawk.* 248; 3 *Ibid.* 393; 1 *British Cr. Cas.* 64, 71; 2 *Ibid.* 130.

D. E. Harbaugh, Prosecuting Attorney of Wayne County, for the people, cited:

People v. Davis, 21 *Wend.* 309; *People v. Chadwick*, 2

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Park. Cr. R. 163; *People v. Caryl*, 12 *Wend.* 547; *Johnson v. People*, 4 *Denio*, 364; *Sasser v. State*, 13 *Ohio*, 453; *Reed v. State*, 15 *Ohio*, 217.

CHRISTIANCY J.:

The information charges the prisoner with uttering and passing as true, a counterfeit bank bill, purporting to have been issued "by the Agricultural Bank, an incorporated banking company in the State of Illinois," with intent to injure the person to whom the bill was passed. The only section of the statute creating or defining the offense is section six, chapter 182 of Compiled Laws, p. 1526. This section, by its reference to section four of the same chapter, has the effect to incorporate section four, so far as respects the description of the bill and of the bank. This section four is in the following words: "Every person who shall falsely make, utter, forge or counterfeit any bank bill or promissory note, payable to the bearer thereof, or to the order of any person, *issued* by any incorporated banking company in this state, or in any of the British Provinces of North America, or in any other state or country, or payable therein at the office of any banking company incorporated by any law of the United States or of any other state, with intent to injure or defraud any person, shall be punished," &c. It is obvious that the words, "*issued* by any incorporated banking company," when applied to the charge for uttering and passing, under the sixth section, can not be taken literally, without confining the operation of the section to cases in which the bills have been made counterfeit by alteration from the genuine; since, if actually "*issued*" by the bank, they must, in all other cases, be genuine; yet it is clear that the sixth section was intended to be as broad as the fourth, which expressly extends to falsely making and forging. This apparent want of logical accuracy arises from grouping together in the same sentence, in the sixth sec-

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tion, the case of altering a genuine bill with that of the false making or forging. The phrase "issued by," &c., when applied to the offense of uttering and passing, must, then, either be construed as equivalent to the words, "purporting to be issued," &c., or "in the similitude of the bills issued by," &c. The first construction would not require the existence of any bank; the latter would imply the necessity of its existence. This being a criminal statute, we adopt the latter, as the more limited construction And to this construction the information conforms.

It is clear that where the charge is for uttering and passing, the bank must be described as an "incorporated banking company." The same is true also of having in possession ten or more counterfeit bills, under section five, as well as for falsely making counterfeiting, &c., under section four.

But as to the offense of bringing into this state or having in possession with intent to utter, &c., under section eight, it would be sufficient to describe the bank as "established" in the places mentioned, without averring it to be incorporated.

Section ten of the same chapter, after enumerating specifically all the foregoing offenses mentioned in sections 4, 5, 6 and 8, including the offense here in question, and dispensing with the evidence of the president and cashier, if out of the state or more than forty miles from the place of trial, and allowing the bills to be proved counterfeit by the testimony of any person acquainted with their signatures, or who has knowledge of the difference in appearance of the true and counterfeit bills, then concludes with the following provision (inserted by amendment April 7th, 1851): "and the lawful existence of any bank out of this state shall be presumed upon evidence that such bank is actually engaged in the business of a bank" (for such I understand to be the operative words of the amendment, notwithstanding the discrepancy between the words declared by the prior portion of the act, to be inserted, and those actually

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inserted in the section as amended.—See *Laws of* 1851, *pp.* 169, 170; *Constitution*, *Art.* 4, §25). Now, as the provision here quoted applies to this offense, and to the bank here in question, and it is quite apparent that its chief object was to dispense with the strict proof of the legal existence of incorporations which might be required at common law, its effect must be, we think, to dispense with all proof upon this point except that which shall be sufficient to show "that the bank is actually engaged in the business of a bank." Upon satisfactory evidence being given of this fact, the statute *presumes* the *lawful existence* of the bank, and no evidence need be given touching the legality of its existence.

The Recorder charged the jury that, in order to convict, they must be satisfied from the testimony that said Agricultural Bank existed. But that general reputation in the community of its existence, and the fact that its bills were passing current from hand to hand in the business transactions of the day, were sufficient evidence of the existence of the bank, for the consideration of the jury; and if they were satisfied from such testimony that there was such a bank as the Agricultural Bank, it would be sufficient evidence to establish that fact. To this charge the defendant excepted.

It will be noticed here, that the only fact in controversy, so far as this exception is concerned, was whether there was *de facto* a bank "engaged in the business of a bank;" and if the evidence in question showing the circulation of its bills as current in the community, and the reputation of its existence, was *admissible at all* as tending to show this fact, then its weight was for the jury; and the charge of the Recorder was correct. The whole question then is reduced to that of its admissibility, as tending to show this fact.

It is to be recollected that no court in the state has the power to compel the attendance of witnesses from another state, or to take their deposition in a criminal case, unless

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the defendant takes a commission for that purpose. It is for this reason, and to avoid the necessity of calling witnesses from a distance, even within the state, that this statute has dispensed with strict proof upon the question whether the bill is genuine or counterfeit; a point upon which there is much greater liability of erring to the defendant's prejudice. And unless such testimony as was here adduced can be admitted, the conviction of knaves and counterfeiters will, in many cases, be rendered impossible.

This consideration must not, it is true, be carried so far as to admit testimony unsatisfactory in its nature, or which may be calculated, from its uncertainty, to endanger the innocent. But we can see no reasonable apprehension of danger, nor any substantial liability to error, from the admission of testimony of the character here in question. It is the same evidence upon which every man relies in the ordinary business transactions of life; upon the faith of which he parts with his property, and trusts with confidence his most important pecuniary interests. There is no subject upon which business men, and especially bankers and brokers, are likely to be so well informed. Their own pecuniary interests compel the most eager and rigid scrutiny, without which they could not safely transact business for a single day. The thermometer is not more sensitive to changes of temperature than the public mind to every thing and to every rumor which is calculated to depreciate the credit of the bills which circulate in the community as money; and nothing, certainly, could tend more to depreciate the credit of such bills than the fact that they were not issued by any institution or association doing business *de facto*.

So general and so intimate are the business relations of the people, at least through all of the states north of the Ohio, and east of the Mississippi, and such are the facilities for the transmission of intelligence by railroad and the electric telegraph, that an imposition of this kind

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would not be likely to succeed for forty-eight hours without being detected, at all the great commercial points at least.

We think, therefore, the evidence given in this case, showing the general circulation of the bills of this bank as money, and the reputation of its existence, was clearly admissible; that such evidence raises a strong, even a violent presumption of the existence of such an institution *de facto*, and that it was engaged in the business of a bank; that if less direct, yet, coming from several witnesses, it is even more satisfactory than the testimony of a single witness who might have been at the bank and seen them issue and redeem bills. And taking into consideration the extreme improbability that any one will counterfeit the bills of a fictitious institution, or of one not "engaged in the business of a bank," or that he would attempt to pass *such counterfeit* bills, knowing them to be such, we can see no reasonable apprehension of danger from such testimony.

The conclusion at which we have arrived will be found fully sustained by the following cases: *Johnson v. People*, 4 *Denio*, 364; *Sasser v. State*, 13 *Ohio*, 486; and *Reed v. State*, 15 *Ohio*, 217. See also as bearing less directly upon the question, but as throwing light upon it, — *People v. Caryl*, 12 *Wend.* 547; *People v. Chadwick*, 2 *Park. Cr. R.* 163; *People v. Davis*, 21 *Wend.* 309.

Several of the cases cited by the counsel for plaintiff in error against this conclusion, when carefully considered with reference to the difference between the statutes affecting them and our own statute, will be found very strongly to confirm it. See especially *State v. Carr*, 5 *N. H.* 367. And none of the cases in the United States, cited by the plaintiff in error, when considered with reference to our statute, will be found to conflict with that conclusion.

No error appearing in the record, the judgment of the Recorder's Court must be affirmed.

The other Justices concurred.

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In the Matter of George N. Farnham.

A magistrate having jurisdiction, under Chapter 194 of the Compiled Laws, to examine and commit for trial, or hold to bail, persons charged with crimes not cognizable before a justice of the peace, has no power to commit a witness for refusing to testify on such examination. He has no powers except such as are expressly conferred by this chapter.

Heard April 18th. Decided April 19th.

Habeas Corpus.

Certain persons being charged, before a justice of the peace of Clinton county, with the crime of murder, the relator, who was a telegraph operator, was called and sworn as a witness, on the preliminary examination of such persons for the offense charged, and a question put to him relative to telegraph communications, supposed by the prosecution to have been sent and received by the defendants or some of them, by or through him, which question he declined to answer. The justice thereupon ordered the relator committed to the common jail, for contempt in so refusing, and issued his warrant to the respondent, a constable of said county, to carry into effect such order. The relator being now brought up on *habeas corpus*,

A. Gould, moved for his discharge, on the grounds:

1. That communications entrusted to an operator for transmission by telegraph, as well as those received by him for delivery, are confidential, and he is not at liberty to disclose them.—*Comp. L.* §§ 2064, 5912. The justice has no right to require the disclosure of communications which the law says he shall not disclose. Compare the provisons with respect to ministers and physicians,—*Comp. L.* §§4322, 4323; *Johnson v. Johnson*, 4 *Paige*, 460. The immunity to them seems to depend entirely upon the statute, and not upon the common law, although there have been exceptions in some special cases:—*Tait on Ev.* 386, 387; *Allison's Prac.* 586. See 1 *Greenl. Ev.* §§ 247, 248.

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The reason why the statute prohibits the telegraph operator from disclosing the communications, is the same as in the case of attorneys, ministers and physicians; that of public policy; the idea that *on the whole* more good will result to the people generally by the prohibition and immunity than without it. And no good reason for the rule can be urged in the case of attorneys, physicians and ministers, that does not apply with equal if not greater force to the case of telegraph operators.

2. A justice of the peace, holding a preliminary examination for an offense which he has no jurisdiction to try, has no power to commit a witness for refusing to testify. He gets all his power from the statute, and the statute does not confer it in this case. In other cases it is expressly conferred:—*Comp. L.* §§ 3913, 3948. And so it is expressly conferred in cases of arbitration, forcible entry and detainer, &c.:—*Comp. L.* §§ 5159, 4193, 4980, 4995. The authority to commit is not an authority or power incident to the office of the committing magistrate, or to the authority otherwise conferred upon the justice in that capacity. He has only such powers as are expressly conferred:—3 *Park. Cr. R.* 503; 26 *Pa. St.* 99; *Tiffany's Cr. Law*, 112.

J. M. Howard, Attorney General, for the respondent.

BY THE COURT:

The statute has conferred upon the examining magistrate no power to commit a witness for refusal to testify, and the relator must be discharged.

The other question, inasmuch as the justice had no jurisdiction to commit at all, it would be improper for the court to pass upon.

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John James and another v. The Pontiac and Groveland Plank Road Company.

The authority to sell the franchises of a plank road corporation on execution, is derived entirely from the statute, and the sale can be made in no other mode than that pointed out by the statute.

That mode is a sale of the franchise to such person as will satisfy the execution, with the legal fees, and take the franchise for the shortest period of time.

A sale of the franchise for a certain period, in part payment of the execution, is entirely unauthorized and void.

The acquiescence of the stockholders in the purchaser taking possession under such an invalid sale of the franchise of a plank road corporation, their payment to him of tolls for passing over the road, and the expenditure by him of moneys in repairing the road, with their knowledge, will not confirm and render valid such a sale.

Heard April 4th. Decided April 20th.

Questions reserved from Oakland Circuit.

In October, 1857, the plaintiffs recovered against the defendants, in the Circuit Court for the county of Oakland, a judgment for $641 57, upon which execution was issued January 14th 1858. On this execution, the sheriff proceeded to sell the corporate franchises of defendants, and they were struck off, as the sheriff returns, to John G. Owen, "for the period of fifty years, and for the sum of sixty dollars; that being the largest sum of money and the shortest period of time bid by any person."

June 18, 1859, defendants moved to set aside this sale, and in opposition to such motion, it was shown by the affidavit of Owen, that many of the stockholders of the company were present at such sale, and knew the manner in which the same was made, and interposed no objection thereto; that since that time, and before the present motion, he had expended $700 in repairs on said road, over and above all tolls received thereon; that most, if not all of the stockholders of said company, have passed over the road, and voluntarily paid tolls thereon to him, since he took possession under his purchase, and knew that he was making valuable improvements upon the road

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under his purchase, and made no objection thereto, and set up no claim against the deponent's rights under such purchase.

On this motion, the Circuit Court reserved two questions for the opinion of this court.

1. Was said sale valid?

2. If not, do the facts set forth in the affidavit of Owen cure the invalidity?

G. V. N. Lothrop, for the motion:

Franchises of a corporation were not subject to seizure and sale on execution, at common law, and the statute which gives the right must be strictly pursued: — 6 *Wheat.* 119; 2 *Doug. Mich.* 506. The rule is fully applied to special sales under execution: — 2 *Mass.* 154; 9 *Mass.* 242; 13 *Mass.* 488; 7 *Me.* 337; 42 *Me.* 414.

The doctrine of waiver can not apply where the act relates to title of property, and is an entire nullity — not voidable, merely, but void. In such cases, to make good the title, the act done must be such an one as by itself would make a good title.

The act of individual stockholders, or the individual acts of all the stockholders, could not amount to a *corporate* act. To bind the corporation, corporate acts are required; and on this ground alone the notion of waiver would fail.

But it is denied that the corporation could confirm a nullity like this. It has no such power. It can not voluntarily alienate its franchise. It is only by an adverse statutory proceeding that this can be done. The corporation can neither hinder nor help it. If not done regularly under the statute, it is not done at all.

M. Wisner, for the purchaser.

MARTIN, CH. J.:

By a general statute of this state relative to corpora-

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tions (*Comp. Laws, Ch.* 73), provision is made for the sale upon execution of the franchises of a class of corporations within which this defendant is embraced. These provisions are substantially as follows: When any judgment shall be recovered against any turnpike or other corporation authorized to receive toll, the franchise of such corporation, with all the rights and privileges thereof, together with all their corporate property, both real and personal, may be taken on execution and sold at public auction. This sale of the franchise, however, is not to the highest bidder, as in ordinary sales upon execution, but to the person who shall satisfy the execution, with all legal fees and expenses thereon, and shall agree to take such franchise for the shortest period of time, and to receive during that time all such toll as the corporation would, by law, be entitled to demand. The officer's return upon the execution transfers to such purchaser all the privileges and immunities of the corporation, so far as relates to the right of demanding toll, and he is required to deliver immediately after such sale, to the purchaser, possession of all the toll houses and gates of the corporation, in whatever county situated; and the purchaser may thereafter demand and receive all the tolls which may accrue during the time limited by the terms of his purchase, as the corporation might had not such sale been made; and he may recover any penalties imposed by law for the injury of the franchise, or from any other cause, which the corporation would have been entitled to recover during such time; the corporation being debarred for such time of that right. In other respects the statute retains to the corporation the same powers, and imposes upon it the discharge of the same duties, and the same liabilities to penalties and forfeitures, as existed before such sale; and it allows the corporation, within three months after such sale, to redeem the franchise, by paying the amount paid therefor, with ten per cent. interest, but without any allowance for the tolls received by the purchaser.

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Now, at the common law, the franchises of a corporation were not subject to seizure and sale upon execution, but could only be reached by proceedings in equity. Such being the case, the sheriff derived his authority to seize and sell solely from this special statute; and he can not proceed under the general law concerning executions. This statute defines who shall be deemed to be the highest bidder, and its obvious intent is that the purchase under the execution shall only be by one who shall pay the amount demanded by the execution, with the legal fees, and shall offer to take such franchise for the shortest period of time. The franchise then is not sold absolutely, as property is under the ordinary executions issued upon judgments, but for a limited period of time; and is acquired by the purchaser for the purposes of reimbursement and indemnity for his payment of the debt; and competition in bidding is confined to this question of time.

The corporation is not deprived of its absolute title to the franchise, nor does the purchaser acquire any, except the right to receive the tolls for a limited period; and he does not assume, nor have imposed upon him, any of the duties and obligations of the corporation.

If a sale can not be made by a sheriff upon these terms, it is his duty to return the execution unsatisfied for want of bidders; upon which the creditor has his remedy against the corporation, or against the stockholders, by proceedings authorized by other provisions of the statute.

In striking off the franchise to Owen, for $60, as the highest bidder, when the amount of the execution exceeded $600, the sheriff exceeded his authority, and the sale was void. Nor do the facts set forth in the affidavits "cure the invalidity." Indeed, it is impossible to conceive of any acts or facts which will render valid that which is wholly void. The parties may, by contract, secure to the purchaser the same rights which he would have acquired under the sale if valid; but such contract would not render the

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sale valid. And this is the distinction between void and voidable acts. Acquiescence may give validity to the latter, but never can to the former.

The individual stockholders were under no obligation to direct the sheriff in the discharge of his duties, nor to protest against that which they knew to be a nullity, or of the character of which they were ignorant.

There is nothing like acquiescence by the corporation indicated by such silence of its members, or by their use of the road and the payment of tolls afterwards. Their convenience or necessities may have required the latter, and it would be a monstrous doctrine to hold, that such necessities of the individual should compromise or extinguish the rights of the corporation. As individuals, they did not represent the aggregate body, nor act as its agents or representatives; and they could not, by their acts or omissions, bind it.

Nor will the fact that Owen has, since the pretended purchase, expended large sums in repairs upon the road, if true, cure such invalidity, both for the reasons above given, and because, if he acted in the best faith, yet he made them voluntarily, without any legal obligation to do so, and upon property not his, but which he held under a void sale.

The questions must be answered in the negative.

The other Justices concurred.

Cornelius O'Flynn v. Jabish Holmes and others.

The Circuit Court can only refer to the clerk, for assessment and report, those cases on default in which such a written obligation or contract as is specified in the statute, is set forth in the declaration as the cause of action, or in which the action is upon a promissory note or bill of exchange, and the plaintiff has filed and served with his declaration a copy thereof.

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O'FLYNN *v.* HOLMES.

Where it is recited in the judgment entry, in a case not proper for such a reference, that the judgment was rendered upon the clerk's assessment of damages, but the prior order of reference to assess was to the *court* as it should have been, the court can not make any presumption, against the recital in the judgment, based upon such prior order, that the court actually assessed the damages; but the judgment imports absolute verity.

It is competent for the court to assess damages after interlocutory judgment, without calling a jury, if none is demanded.

Heard April 10th. Decided April 20th.

Error to Wayne Circuit. The facts are sufficiently stated in the opinion.

C. O'Flynn, in person.

D. J. Davidson, for defendant in error:

The recital in the judgment of a reference to the clerk, must be deemed a clerical error; the record itself shows it to be such. All favorable intendments are always extended to judgments:—4 *Clark* (*Iowa*), 146; 8 *Dana*, 190; 5 *Gilm.* 478; 2 *W. & S.* 135; 4 *Eng.* 69; 1 *Green* (*Iowa*), 363; 3 *Eng.* 372; 6 *Ind.* 448. The party who insists on error, must make the record affirmatively show it:—25 *Ala.* 30; 19 *Ga.* 93; 26 *Vt.* 112; 22 *Ga.* 168. And when no injury has resulted from the error assigned—and none is alleged here—the judgment will be affirmed:—3 *Green* (*Iowa*), 205; 16 *Ala.* 437; 18 *Ala.* 819; 15 *Ala.* 43, 317; 17 *Ala.* 696; 9 *Gill*, 1, 56, 156. And if the defect complained of be a mere irregularity, the court should not disturb the judgment unless a motion to set the same aside has been made in the inferior court:—22 *Mo.* 335; 11 *Fost.* 22; 6 *Mo.* 321.

MARTIN CH. J.:

Under the statute (*Comp. L. Ch.* 130), the Circuit Court can only refer to the clerk for assessment and report those cases in which a written obligation or contract is set forth in the declaration as the cause of action. This reference is made after interlocutory judgment, and the obligation or contract must be in writing, and be either a bill of

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exchange, promissory note, order, or draft for the payment of money, or some contract for the payment of money, or for the payment of a sum certain though payable in specific articles, or for the delivery of specific articles at a stipulated value or price. The only exception to the requirement that the written instrument shall be set forth in the declaration as the cause of action, is in cases where the action is upon a promissory note or bill of exchange, and the plaintiff shall file and serve with his declaration a copy of such note or bill; in which case the damages may be assessed as though the instrument had been specially set out in the declaration.

In the present case, the declaration containing only the common counts in assumpsit, the clerk clearly had no right to assess, but the damages should have been ascertained by the court or by a jury. The order of reference appears to have been to the court, as was proper; but the judgment entry shows, that the clerk actually ascertained and reported the damages, that the court assessed damages upon such report, and that the judgment was rendered thereupon. It was suggested, on the argument, that as the order of reference was in regular form, this court, after judgment, should presume the subsequent proceedings to have been regular and in conformity with it, upon the well settled maxim that every presumption should be in favor of the judgment. But the order was the entry of the plaintiff's attorney, made of course, after default; while the judgment entry is the act of the court; and it is that which the law presumes imports absolute verity. No presumption can therefore arise against the judgment, based upon the order of reference; for the whole record may be, and is undoubtedly true. Had the judgment been entered in the form prescribed by law (*Comp. L.* § 4431), this question could not possibly have arisen. This section provides, that the record shall state no reference to the clerk, nor any proceedings in consequence thereof; but that the damages

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shall be stated as having been assessed by the court; but this disregard of the statute does not authorize us to overlook the facts deliberately set out in the record, or to presume any thing contrary to it.

It is further contended, that as the statute (§ 4437), provides, that in suits wherein the clerk can not assess the plaintiff's damages, such damages may be assessed by a jury, the duty of referring the question to a jury is imperative, and that an assessment by the court without a jury is illegal and void. Such was undoubtedly the case before the adoption of the Constitution of 1850, and the subsequent legislation respecting juries. But by the 27th section of article VI. of the Constitution, it is provided that the right of trial by jury shall remain, but shall be deemed to be waived in all civil cases, unless demanded by one of the parties in such manner as shall be prescribed by law. By the provisions of the act of 1853 (*Comp. L.* § 3435), all issues and questions of fact shall be tried by the court, unless a jury be demanded by one of the parties, in a manner prescribed by the rules of court; and by the Circuit Court rules, this demand is required to be made in writing.*

These provisions of the Constitution and statute evidently contemplate a dispensation, in all cases, with a jury, unless demanded by a party having a right to make such demand, or when ordered by the court. Now, in cases of assessment after interlocutory judgment, the amount of damages to which the plaintiff is entitled, although not put in issue, is still a question of fact; and by suffering default, the defendant has deprived himself of the right of tendering an issue; but if he has appeared, he, as well as the plaintiff, may

* The rule on this subject is as follows: "Rule 61. A party desirous of a trial by jury shall make his demand for a jury in writing, and file such demand with the clerk on or before the first day of the term for which the cause is noticed for trial, and at or before the first call of the calendar; otherwise he shall be deemed to have waived his right to a jury: Provided, however, that the Judge of any Circuit Court may, whenever he deems it advisable, by a rule of said court, require the demand for a jury to be made and filed within such time before the commencement of any term thereof, as may be designated in such rule."

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still demand a jury for the purposes of the assessment; while, if he has not appeared, the plaintiff may, although the defendant has forfeited such right. To this extent, the provision of the statute requiring the assessment to be made by a jury, which existed before the Constitution of 1850, is modified by it and subsequent legislation.

The judgment of the Circuit Court must be reversed, and the case sent back for re-assessment of damages.

The other Justices concurred.

James D. Franklin v. James P. Mansfield.

Notice of Hearing. What is sufficient.

Heard and Decided April 21st.

Error to Wayne Circuit.

A. Russell, moved to strike this cause from the docket for the want of a proper notice of hearing. The following is a copy of the notice:

"State of Michigan. In the Supreme Court for the state of Michigan. James D. Franklin, plaintiff in error *v.* James P. Mansfield, defendant in error. Detroit, March 27, 1860. Sir: Take notice that the above entitled cause will be brought on for hearing and argument, at the next term of said Court, to be held at the city of Detroit.

Yours &c.,

MOORE & BLACKMAR,

Att'ys for Def't in error.

To Messrs. WALKER & RUSSELL, *Atty's for Piff. in error.*"

Mr. Russell claimed that the notice failed to comply with the rules in three particulars:

1. It does not show to what clerk's office the papers were originally returned: *Rule* 43. 2. It does not name the term at which it is designed to bring the cause to

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a hearing. 3. It is not a notice of hearing for the *first day* of the term: *Rule* 25.

W. A. Moore, contra.

THE COURT held the notice sufficient.

Robert M'Laughlin v. The Detroit and Milwaukee Railway Company.

A certificate issued by a corporation in the ordinary form of certificates of stock, but containing a promise on the part of the corporation to pay interest thereon until the happening of a specific event, constitutes the person to whom it is issued a stockholder and member of the company.

The corporation can not by a vote of the stockholders, without the individual assent of the holder, oblige him to receive their bond, instead of money, for the interest upon such certificate.

If a railway corporation have authority to issue such a certificate, they may ratify one which has been issued by their officers without authority. And, it is sufficient evidence of such ratification that the corporation, at a regular meeting of the stockholders, pass a resolution for the payment in their bonds of interest on such certificate.

Heard April 20th. Decided April 25th.

Case made after judgment, from Shiawassee Circuit Court, into which the cause had been removed by appeal from a justice of the peace.

The action was brought to recover interest upon a certificate of which the following is a copy:

"State of Michigan. No. 662. 10 *Shares:* Detroit and Milwaukee Railway Company. Robert McLaughlin, of Shiawassee county, is entitled to ten shares, of fifty dollars each, of the capital stock of the Detroit and Milwaukee Railway Company, transferable in person or by attorney only on the surrender of this certificate, and bearing interest at seven per cent., payable 1st January and 1st July, until the road is open to Lake Michigan. In witness whereof, the president and treasurer of the said company

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have hereto subscribed their names, at the city of Detroit, this first day of January, A. D. 1856.

H. LEDYARD, *Vice President.*
C. C. TROWBRIDGE, *Treasurer.*"

On the part of plaintiff it was proved, that on or about August 10th, 1857, he presented said certificate to the treasurer of said Railway Company, who computed the interest then due upon it, which he found to be $54,-33, and said treasurer then tendered in payment thereof a special interest bond, which plaintiff refused to receive, and demanded the money. The defendants then proved from their books, that at a meeting of their stockholders, called for the election of directors, and the transaction of such other business as should come before them, held at their office November 11th, 1856, after due notice, a resolution was passed of which the following is a copy: "Resolved unanimously, that in view of the necessity of applying all means raised on the bonds sold, to finish the road at as early a day as possible, the interest on stock, until the road is completed, shall be payable in special interest bonds, falling due the 1st January, 1860, bearing interest at the rate of seven per cent. per annum, payable half yearly, at the treasurer's office in the city of Detroit; the said bonds to be issued in sums of one hundred dollars each. And in case any party is not entitled to a full bond for interest, that he shall receive such a bond upon paying the difference in cash: said bonds to be issued as of and after the 1st of January next." Which resolution was insisted upon as a bar to the action.

The Circuit Court rendered judgment for defendants, and plaintiff removed the the case to this court.

H. McCurdy, for plaintiff.

A. & E. Gould, for defendants:

It does not appear that the officers issuing this cer-

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tificate, had authority to make such a contract. This it was incumbent on plaintiff to show:—*Paley on Agency*, *Ch.* 3, § 2; 2 *Kent*, 614. The principal is bound only by the acts done by the agent within the scope of his authority:—*A. & A. on Corp.* §§ 294, 297; 3 *Kern.* 599, 632; 2 *Kent*, 291; 5 *Wheat.* 326; *Walk. Ch.* 219. The defendants' act of incorporation vests in these officers no power to make such a contract, and the power to make it must have been expressly granted or subsequently ratified:—*Pierce R. R. Law*, 130, 373; *A. & A. on Corp.* § 298; 2 *Kent*, 614.

The plaintiff being a shareholder, was bound by the resolution of the company passed at a regular meeting of the stockholders:—*A. & A. on Corp.* 499; 7 *S. & R.* 517; 2 *How.* 522; 2 *Kent*, 293. The company had by this determined in what manner such interest should be paid, and the funds of the company disposed of in its legitimate business; and the plaintiff being one of the company is bound by its action.

CHRISTIANCY J.:

The plaintiff's counsel, upon the argument of this cause, seemed to concede that, if the plaintiff was a stockholder or member of the company, he would be bound by the resolution of the 11th of November, for the payment of the interest in bonds instead of money; and hence, he insists that the certificate upon which the action is brought, is not properly a certificate of stock, but merely evidence of a conditional subscription; and that the plaintiff would not become a stockholder until the condition should be performed by the opening of the road to Lake Michigan.

We think the certificate, if valid (a point we shall presently consider) is in every proper sense an absolute certificate of stock, with an agreement incorporated in it for the payment of semi-annual interest; and that it constituted the plaintiff a stockholder and a member of the company.

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But as the case does not show that the plaintiff ever assented to, or acquiesced in, the resolution of the company, we can see no plausible ground for holding him bound by the resolution.

The stipulation in the certificate, for the payment of interest, constituted a contract between the company and the plaintiff, as an individual: it created the relation of debtor and creditor to the extent of the semi-annual interest. The company could no more change, affect or modify, his rights or their liability under this contract, by a resolution or by-law, without his individual consent, than they could in the same way affect their contract with or liability to a stranger:—*Revere v. Boston Copper Company*, 15 *Pick.* 363; *Ins. Co. v. Conner*, 17 *Pa. St.* 136; *American Bank v. Baker*, 4 *Met.* 176.

The authorities cited on the part of the defendants have no bearing upon this question; they only show the general right of the majority to bind the individual stockholders in all matters legitimately within the corporate powers of the company, and subject to the law of the land: not to make their own bonds a tender in payment of an acknowledged indebtedness to an individual, whether a stockholder or not. The power of the company to issue stock with such a stipulation for interest, is not denied by the defendant's counsel; but he insists that it is not within the ordinary powers of the president and treasurer to issue stock of this kind, without special authority from the company; and hence, to bind the company, that their authority should be shown.

We do not deem it necessary to enter upon the consideration of this question, since the power of the corporation to have authorized it, is not disputed. If they could authorize their officers to do it, they can ratify their acts when done; and the very resolution upon which the defendant relies for a defense, very clearly recognizes the validity of this interest-bearing stock, and thereby ratifies it,

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if it needed ratification. The company can not deny that this resolution applies to this identical stock, since they prove it, and rely upon it as a defense to an action upon this certificate. The judgment of the Circuit Court must be reversed, and a new trial granted.

MARTIN CH. J., and MANNING J., concurred.

CAMPBELL J., did not sit, being a stockholder in the company.

The People v. Revilo Wells.

The court can add nothing to a special finding, or infer any facts which the jury have not inferred and set forth. The court can draw only the legal conclusions from the facts found.

Where defendant was indicted under §5899 of Compiled Laws, and charged with illegally issuing a certain draft in the similitude of a bank bill, and a special verdict was returned, which found that the defendant paid out the draft on a check drawn upon him, but did not find that defendant was in any way a party to the instrument, or in any manner connected with, responsible for, or interested in it, except what might be inferred from the single fact of his paying it out; — *Held*, that such "paying out" of the draft is not necessarily equivalent to, or identical with the "issuing" of the paper, within the meaning of the statute, and that the special verdict failed, therefore, to bring the defendant within the statute.

Heard April 21st. Decided April 25th.

Question reserved from Kent Circuit, where defendant was indicted for unlawful banking, and a special verdict found.

The indictment was found at the December term, 1858. The first count is as follows:

"The grand jurors of the people of the state of Michigan, good and lawful men duly empannelled and sworn, inquiring in and for the body of the county of Kent, upon their oaths present, that Revilo Wells, of the city of Grand Rapids, on the second day of December, in the year of our Lord one thousand eight hundred and fifty-eight, at the

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city of Grand Rapids, in the county of Kent aforesaid, not being authorized by law to do a regular banking business, and to issue bank bills, did issue a certain draft in the similitude of a bank bill, which said draft was of the tenor following, that is to say:

"[2] Kenosha, Wisconsin, Oct. 1st, 1858. [2]
"Savings and Exchange Bank of R. Wells, Grand Rapids,
"Mich. Pay to C. Allen or bearer, in Current Bank Notes,
"Two dollars on demand.
"Accepted, *Wm. A. Wells.*
"Two. *R. Wells, Banker.* Two."

Against the peace," &c.

There were four other counts, which are sufficiently stated in the opinion.

The special verdict is as follows:

"Afterwards to wit, on the day and at the place within named, before Hon. Louis S. Lovell, the Circuit Judge of the eighth judicial circuit of the state of Michigan, and presiding judge of the said court, came the within named Stephen G. Champlin, Prosecuting Attorney of the said county of Kent, for and on behalf of the People of the state of Michigan, and the said Revilo Wells, in person as well as by his counsel, also appearing, and jurors of the jury whereof mention is within made, being called, likewise came, and being elected, tried and sworn, upon their oaths do say, that the said Revilo Wells, on the second day of December, A. D. 1858, at his office in the city of Grand Rapids, did pay out to one Miles Lattimer, two hundred dollars in bills, on two checks drawn on said Wells, of one hundred dollars each. That one hundred dollars of such sum consisted in bills of various banks in Illinois and Wisconsin, and the other hundred dollars was paid in bills or drafts similar to that charged in the indictment, and one of which was the identical draft charged in said indictment: that the same is in the similitude of bank bill.

"And the jurors of the jury aforesaid do further say, that

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they also find that in the month of October, A. D. 1858, the said Revilo Wells did exhibit to John Ingraham a package containing one hundred dollars, in drafts or bills similar to that charged in the indictment.

"And the jurors of the jury aforesaid, upon their oaths aforesaid, do further say, that they also find that bank notes which are current for the purposes of trade and commerce in the city of Grand Rapids, are not convertible into specie at par, in the said city of Grand Rapids, at the will of the holder.

"But whether," &c.

The questions arising upon this special verdict were reserved by the Circuit Judge for the opinion of this court.

J. M. Howard, Attorney General, for the People.

T. Romeyn, for defendant.

CHRISTIANCY J.:

The questions involved in this case arise upon the indictment and the special verdict.

The first and fourth counts charged, in substance, that the defendant, not being authorized by law to do a regular banking business and to issue bank bills, "did issue a certain draft in the similitude of a bank bill," setting forth the draft.

The second count charges that defendant "did issue a certain draft to be put in circulation as money."

The third, that he "did issue" the draft "to be used as a currency or circulating medium."

The fifth, that he issued it, "to be loaned or put in circulation as money;" and the sixth, that he issued it "to pass or be used as a currency or circulating medium." All the counts set forth the same draft in *haec verba*.

All these counts, then, charge the defendant with having "issued" the draft, and it is manifest from the statute upon which the indictment is founded (*Comp. L.* §5899),

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that the substantive offense, in every form defined by the section, consists in the issuing of the paper therein described: that, whatever other ingredients may be required to complete the offense, if the defendant did not "issue" the paper, he has committed no offense under this section.

Have the jury, by their special verdict, found that the defendant issued the paper as set forth in any count of the indictment? This is the first question, and if decided in the negative no other question can properly arise.

The special verdict, so far as this point is involved, only finds that the defendant "*did pay out*" the paper in question to one Miles Lattimer, on a check drawn upon the defendant.

The court can add nothing to this finding: they can draw only the legal conclusions from the facts found. No facts can be inferred by the court which the jury have not inferred and set forth; especially against a defendant in a criminal case. To this verdict the maxim applies, in its full force; "*de non apparentibus et non existentibus, eadem est ratio, et judicium.*"

This verdict does not find that the defendant is the same person whose name purports to be signed to the acceptance set forth in the indictment, or that he had any connection with or interest in the "Savings and Exchange Bank of R. Wells," upon which the draft purports to be drawn; nor that he was a banker, or in any manner connected with, responsible for, or interested in the paper in question, except what is to be inferred from the single fact of paying it out upon a check drawn upon him.

None of these facts, which the verdict has omitted, can be supplied by the court.

We are compelled, therefore, to consider the defendant as no otherwise connected with, or responsible for, the issue of this paper, than any other individual would be by the naked fact of paying it out upon a check or order drawn upon him; and the question is whether such "pay-

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ing out" is necessarily equivalent to, or identical with, the "*issuing*" of the paper, within the meaning of this statute?

We do not think this is the fair import of the term "*issue*" as here used.

This section, so far as relates to the present question, is the same found in section five of chapter fifty of the Revised Statutes of 1846. The chapter is there entitled, "*Of unauthorized banking, and certain notes or evidences of debt issued by banks.*" The amendment of 1853 (*Laws of* 1853, *p.* 20), in no way affects the present question. An examination of the chapter, as it now stands (*Comp. L.* §§ 5895 *to* 5903) will, we think, show very clearly that the term is not used in the sense of merely passing, or paying out, by a person in no way a party to the paper, nor connected, as principal or agent, with its *original* issue, and who is to derive no profit or benefit from the illegal enterprise.

By the first section, "no person unauthorized by law, shall subscribe to, or become a member or in any way interested in, any association or company formed for the purpose of issuing notes or other evidences of debt, to be loaned or put in circulation as money; nor shall any person unauthorized by law subscribe to, or become in any way interested in, any bank or fund created or to be created for the like purposes, or either of them."

Section two imposes a penalty for becoming a member of such company, or being interested in such fund.

Section three prohibits any incorporated company, not expressly authorized by law, from employing any part of its effects, or being in any way interested in, any fund that shall be employed for the purpose of receiving deposites, making discounts *or issuing notes*, or other evidences of debt "to be loaned or put in circulation as money," and imposes a penalty for a violation of the section.

Section four declares all such notes, &c., mentioned in the preceding section, void.

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Section five (upon which this indictment is based), as amended by the act of 1853, enacts, "No person, association or body corporate, whether public or private, except such bodies corporate as are or shall be expressly authorized by law to do a regular banking business, and to issue bank bills, shall issue any bills, notes, due bills, drafts or other evidences of debt, in the similitude of bank bills, or to be loaned or put in circulation as money, or to pass or be used as a currency or circulating medium;" and imposes the penalty for a violation.

This section distinguishes between the act of issuing by the parties interested, and the passing or circulating by other parties: the latter is stated as the purpose for which the former act is committed.

The sixth section prohibits any corporation, authorized to do a banking business, from making their bills payable in any thing but specie, or at any other place but their banking house, &c.

By the seventh section it is enacted, "No person shall pay, give or receive in payment, or in any way circulate or attempt to circulate, any bank bill, promissory note or other evidence of debt, *issued* by any banking company, or by any other corporation within this state or elsewhere, which shall purport to be for the payment of a less sum than one dollar, or which shall be made payable otherwise than in specie on demand;" and imposes a penalty.

This section makes a clear and manifest distinction between the *issuing* and *paying* or *circulating*, and imposes a penalty for *paying* or *circulating* the paper there described, "issued by any banking company," &c. If this section had been made applicable to the paper described in the fifth section, the special verdict would have brought the defendant within it. And if it had been intended to make the offense consist in the paying out or circulating the paper described in the fifth section, no good reason can be given why the Legislature should not have used language similar to that in the seventh section.

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The eighth section also makes a distinction between the *issuing* and the *passing* or *circulating* post notes, &c.

Upon a full examination of the statute, therefore, we think it too clear to admit of any reasonable doubt, that the special verdict in this case fails to bring the defendant within any provision of this statute, or any other statute of this state.

It must be certified to the Circuit Court for the county of Kent, as the opinion of this court, that upon the facts found by the jury, defendant is not guilty in manner and form as charged in the indictment.

MANNING and CAMPBELL JJ., concurred.

MARTIN CH. J., was absent.

The People v. Charles Jackson.

Convictions in the Recorder's Court of Detroit, for offenses against city ordinances, can not be brought before this court for review on exceptions before sentence, under Chapter 197 of the Compiled Laws.

Heard April 24th. Decided April 27th.

On exceptions from the Recorder's Court of Detroit.

A. Russell, for the People.

L. Bishop, for defendant.

THE CHIEF JUSTICE:

This is a motion to dismiss the bill of exceptions brought up before judgment, in a prosecution for an offense arising under an ordinance of the city of Detroit. We have already decided (*see p.* 78), that questions arising upon the trial of such prosecutions could not be reserved for our advice, nor entertained by us, for want of jurisdiction. The same rea-

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sons which exclude jurisdiction in such cases, apply to the bill of exceptions now before us. The Recorder's Court has a twofold jurisdiction. Jurisdiction under the general laws of the state, over prosecutions for offenses against such laws committed within the city, and jurisdiction over prosecutions for violations of city ordinances. In respect to the former, the general laws in all respects apply; and cases, questions, and bills of exceptions may be exhibited to us, precisely as they may by a Circuit Judge or Court. But in respect to the latter, no such right exists in the Recorder, nor is any such jurisdiction conferred upon us.

A careful examination of the charter will show, that the powers and jurisdiction in the latter class of cases are not co-extensive with those in the former, and that it was the intention of the Legislature to keep them distinct. For example, all writs and process issuing from said Recorder's Court on complaints under the ordinances, shall be to the marshal or any constable of the city; while those for offenses against the general laws, shall be directed to the sheriff, shall run in the name of the People of the state of Michigan, and shall be sealed, &c. Prosecutions under the general laws shall be by indictment, complaint or information, in the name of the People, signed by the prosecuting attorney, &c., while those for violations of a city ordinance shall be by written complaint of any one aggrieved, sworn to by him, and the intervention of the prosecuting attorney is not required. The city attorney or any private attorney acts in behalf of the prosecution in the latter case. The complaint in the former case is an official act: in the latter it is not necessarily such.

Again, by the provisions of the Constitution and of the common law, persons charged with crime must be tried by a jury, and the law is well settled that this is imperative, and not a right to be waived: yet under the charter, in all trials for offenses against it, or the ordinances of the city, this right shall be deemed waived unless a jury be demanded.

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These are a few of the illustrations to be found in the charter of the twofold nature of the Recorder's jurisdiction, and of the conclusion at which we have arrived, that in proceedings for breaches of ordinances, the general rules applicable to proceedings in the Circuit Courts, or in the Recorder's Court, for offenses against the general laws, so far as they relate to the reservation or removal of cases before judgment, do not apply.

Much reliance is placed upon the language of § 24 of the charter,* in urging this right of bringing these exceptions before us. But a careful examination of the section, and of the whole chapter VI, will show that it has reference only to the removal of cases arising under general laws. "Like proceedings" refers as well to character as to details, and those under complaints for violation of ordinances, can hardly be likened in character to those under indictments or informations for breaches of general laws.

At the common law no exceptions would lie in criminal cases, and it is only by force of the statute that any right to take them exists. The statute gives such right only in cases of violations of general laws. The ordinances of the city are no more nor less than by-laws of a corporation; and it would be strange indeed if such could be raised to the dignity of general criminal laws, or courts of general jurisdiction could take cognizance of such ordinances, or of proceedings to enforce them, in like manner as they can of general laws, or proceedings under them, without express legislative provision.

The motion must be granted.

* This section is as follows:

"Sec. 24. All the proceedings of said Recorder's Court, at any time before or after final judgment or sentence, may be removed to the Supreme Court by writ of error or other process, in the same manner that like proceedings may by law be removed to the Supreme Court from the Circuit Courts of the state; and the Supreme Court shall proceed to adjudicate thereon, in the same manner as on proceeding removed from said Circuit Courts."

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James N. Cross v. The People.

Proceedings in the Circuit Court, under the Bastardy Act, can not be removed into this court by writ of error.

Heard April 24th. Decided April 27th.

Error to Washtenaw Circuit, where plaintiff in error had been tried by jury, under the Bastardy act, found guilty, ordered to make certain payments for the support of the bastard child, and to give bond to the county superintendents of the poor to indemnify the county against the maintainance of such child. To remove the proceedings into this court, he sued out this writ of error.

J. M. Howard, Attorney General, moved to dismiss the writ, on the ground that error would not lie in such a case.

O. Hawkins, contra.

THE CHIEF JUSTICE:

The proceedings under the Bastardy act are purely statutory, and not after the course of the common law. They are anomalous in character, partaking in some respects of a civil and in others of a criminal nature. They may be instituted either in the name of the People, or of the complainant, as they are partly for the benefit of such complainant, and partly for the indemnity of the public. The complainant is, in all cases, a witness; no costs follow the judgment, and the issue to be tried is the paternity of the child with which the complainant is pregnant, or of which she has been delivered. No judgment known to the common law follows the verdict, but, if found guilty, the defendant is adjudged to be the father of the child, and made chargeable with its maintenance, with the assistance of the mother, in such manner as the court shall

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order, and is required to give bonds to the superintendents of the county poor to perform such order, and to indemnify the county against charge for its maintainance. The proceeding may either be instituted by the female, or by the superintendents of the poor of the county, when such child is chargeable, or likely to become chargeable to the county, and such superintendants have power to compromise and arrange with the putative father relative to the maintainance of the child, and to discharge him from liability for its support. The judgment of the court upon the question of paternity, and the maintenance of the child, is also declared by the statute to be final.

All these things indicate that the examination or trial of the question of paternity is not after the course of the common law, and that the proceeding is not strictly either civil or criminal; and it follows that no exceptions can be taken upon which a bill can be signed, nor a writ of error issued to remove the record: — See *Comp. L.* §§4404, 5332, 6083. The Legislature moreover evidently contemplated that the proceedings in the Circuit Court should be summary; and the declaration that the judgment should be final, clearly indicates the intention that the ordinary remedies for reviewing proceedings and correcting errors should not be available to either party. It amounts to a prohibition of exceptions, and of the writ of error, and clearly shows that the proceeding was regarded as extraordinary and anomalous, and that jurisdiction was limited to the Circuit Court.

This court held in *Holbrook v. Cook*, 5 *Mich.* 225, that the writ of error will not lie when the proceedings are not after the course of the common law, and that it is not enough that they are had in a court which ordinarily and primarily exercises common law jurisdiction. The proceedings themselves must be after that course, or the remedy by such writ expressly given.

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It follows that the only remedy available to the party aggrieved, is that of the writ of certiorari.

The motion must be granted.

Hugh H. Wright v. Owen Dudley and others.

Where a bill was filed to foreclose a mortgage, and making other persons than the mortgagor parties, charging that one of them had given a prior mortgage on the same premises, which he had since paid, but caused to be assigned to one of the other defendants for the purpose of keeping it alive against complainant's mortgage; and asking that it be decreed to have been satisfied — but the bill did not show any privity of title to the land between the parties to the first and the parties to the second mortgage, or what was the state of the title at any time, or any obligation on the part of the first mortgagor which would entitle the second mortgagor, or his assigns, to require him to pay or remove such first mortgage; — *Held*, that the bill showed no title to relief as against the parties to such first mortgage.

A return to an appeal in chancery should include full copies of all the proceedings in the case; so that the transcript shall present everything which appears in the court below.

Heard April 20th. Decided May 1st.

Appeal in Chancery, by defendants Horace and Norman Green, from Shiawassee Circuit.

The court having decided (*ante p.* 74), that the copies of the Judge's minutes of the testimony, taken on the trial, could not be considered, the cause went to a hearing on the question whether the bill of complaint was sufficient on its face, to entitle complainant to any relief against the appellants. The allegations in the bill are sufficiently shown by the opinion.

A. & E. Gould, for complainant.

H. McCurdy, for appellants.

CAMPBELL J.:

The bill in this case was filed to foreclose a mortgage, given by Owen Dudley and wife, to complainant, concerning which no controversy arises. But the bill proceeds to

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charge that, a year previous to the date of this mortgage, Horace Green, a defendant, executed a mortgage of the same premises, to one Richard Elliot, who assigned the same to Henry P. Baldwin; this latter mortgage being duly recorded shortly after its date. That in August, 1857, and subsequent to the date of complainant's mortgage, Horace Green called on the holder of the Elliott mortgage, and paid the amount, asking and receiving an assignment thereof to Norman Green, his son. Complainant avers that this money so paid was Horace Green's, and that therefore he had no right to take an assignment to his son, and that the money should be regarded as a payment. He also avers that Dudley told him, when he took the mortgage now in process of foreclosure, that the land was unincumbered.

The Circuit Court of Shiawassee made a decree, cancelling the mortgage held by Norman Green, and granting costs against Horace and Norman Green. The decree also contained the usual clauses of foreclosure decrees, upon the complainant's mortgage against Dudley and wife.

The defendants, Horace and Norman Green, claim that the complainant's bill makes out no case against them, and that without the necessity of relying on their answers or upon testimony, they are entitled to a reversal of the decree against them.

The bill contains no averments from which we can gather the state of the title at any time, or which show any privity of title whatever among these parties. It is not averred that Dudley traced title in any way through Elliott or Green, and there is no averment or showing from which it appears that, if the title had been so traced, there was any agreement made by Horace Green, or any obligation resting upon him, which would entitle Dudley or his grantees to require him to pay or remove the Elliott mortgage. Unless some such duty rested on him, complainant has no concern with his doings.

There was therefore no foundation whatever for any re-

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lief against Horace or Norman Green, and the bill should have been dismissed as to both of them.

We take occasion to notice here an omission of the register, in certifying the transcript, which becomes immaterial in this case, but which arises probably from a misapprehension which has led to several similar mistakes in cases brought up from that county. Instead of giving copies of the writs, orders, and other proceedings, he has returned nothing in full but the pleadings and the decree. The whole proceedings should have been certified in full. The transcript should present every thing which appears in the court below.

The decree must be reversed so far as it relates to Horace Green and Norman Green, and the rights of either or both of them, and the bill must be dismissed as to both of them, with costs.

The other Justices concurred.

Lorenzo D. Crippen v. The People.

The defendant being found guilty on an indictment for nuisance in maintaining a mill dam, and a judgment or order thereupon entered that the said mill dam be removed, and that a writ issue to the sheriff for its removal; *Held*—

1. That such judgment or order was such a final judgment or determination as error would lie upon:

2. That the power to order such removal cannot precede, but must be exercised at the time of imposing punishment by fine or imprisonment, and form part of the same judgment; and no such punishment having been imposed, the order to remove the nuisance was erroneous:

3. But that although such judgment was erroneous, yet the errors assigned in the case being all based on decisions of the court preceding the judgment, this court will look into the errors assigned, and if any of them are sustained, will reverse the judgment on that account, and order a new trial, instead of ordering an absolute reversal for the error in the judgment itself.

Affidavits on which a motion for a new trial was based in the court below, form no part of the record, and can not be looked into in this court, for the purpose of determining whether the court erred in denying the motion.

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CRIPPEN v. THE PEOPLE.

On the impanneling of a jury, it is irregular for counsel to put questions to the jurors called without interposing any challenge, and no error can be assigned to the action of the court in allowing jurors thus questioned, but not challenged, to be sworn to try the case.

A person who has formed and holds an opinion, that mill dams generally in that part of the country are nuisances, and, that all he is acquainted with are such, is not a competent juror for the trial of an indictment for nuisance in keeping up a mill dam, though he states that he is not much acquainted with the dam in question, and has not formed or expressed any opinion regarding it.

It is competent for defendant, on the trial of such indictment, to show by the cross examination of witnesses for the prosecution, that they have commenced civil suits for injury caused by the same dam, and then agreed together to suspend action in such suits, and get defendant indicted, and, in that way, procure the removal of the dam. Such evidence is admissible to show the interest of the witnesses in the public prosecution, and the influence it might have on their testimony.

It is competent for defendant, in such case, to show that former owners of the mill were indicted and tried for nuisance in keeping up the same dam, and acquitted, and that the question litigated on the former trial was whether the dam was a nuisance or not; as such acquittal is evidence that the dam was not a nuisance at that time, though not evidence that it has not since become such.

Heard April 11th. Decided May 4th.

Error to Branch Circuit, where defendant was indicted for causing a public nuisance, by keeping up a mill dam across the Coldwater river, at a place called Hodunk, in Girard township.

From the bill of exceptions in the case, it appears that when the clerk had drawn from the jury box the names of twelve jurors, "the counsel for the defendant being asked by the court if they had any objections to any of the persons so called as jurors as aforesaid, then and there inquired of the said persons, so called as jurors, touching their indifferences between the said People and the said defendant, and as to whether or not they or any of them had formed or expressed any opinion respecting the guilt or innocence of the said defendant of the charge contained in the said indictment; and upon such inquiry one of the said persons so called as jurors stated, among other things, that he had formed, and then and there had an opinion as to whether or not mill ponds in this part of the country with which he was acquainted are nuisances, when the water covers a large surface, and was filled with vegeta-

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ble or other filthy or decayed matter; that he knows nothing of the dam or pond in question, and has formed no opinion concerning it.

"The defendant's counsel then asked the said juror, 'what is your opinion respecting mill dams generally, in this part of the country?' To which question the counsel for the People objected; the objection was sustained by the court, and the question was not allowed to be put; to which the counsel for the defendant then and there excepted.

"The defendant's counsel then objected to the competency of the said juror, that having formed an opinion as to whether mill dams generally in this part of the country are nuisances, he was not an indifferent person between the People and the said defendant, and ought not to be sworn as a juror in this case. Which objection the court overruled, and the said person so called was sworn, and took his seat as a juror upon the trial of said indictment; to which the counsel for the defendant then and there excepted.

"And upon calling and impanneling of the said jury, the name of Lucius Beall having been called by the clerk, the said Lucius appeared and answered to his name, and was then and there, by and on behalf of the said defendant, duly challenged for cause, and having been then and there duly sworn to answer truly such questions as should be put to him touching his competency to serve as a juror in said cause, he, the said Lucius Beall, did there and then depose and swear (amongst other things) in substance and to the effect following, to wit: That he had formed, and there and then had an opinion, that mill dams generally in this part of the country are nuisances, and create malaria, and thereby produce disease; that when the water is dammed up, and the pond covers a large surface, and is filled with vegetable and other filthy or decaying matter, it is a cause of disease; that all the mill

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dams with which he is acquainted he believes to be nuisances, and that they produce disease; that he was acquainted with only three or four mill dams in this section of the country, and he believes that all the mill dams with which he is so acquainted are nuisances, and produce disease and sickness. That he is not much acquainted with the dam and pond in question in this cause; that he has seen said dam and pond, and has passed near the same, but never noticed it particularly; that he knew very little about the dam or pond in question, and has neither formed nor expressed any opinion about the matter.

"The defendant's counsel then objected to the said Lucius Beall as a juror in said cause, for the reason that it appeared that he was not indifferent between the People and the said defendant, and insisted that good and sufficient cause for challenge to the said Lucius Beall had been shown, and thereupon moved the court that the said Lucius Beall be set aside for cause shown; which objection and motion were there and then overruled and denied by the court, and the court there and then decided that no cause for challenge to the said Lucius Beall had been shown, and that he was a competent and proper person to be sworn and serve as a juror upon the trial of said cause; to which decision and ruling of the court the counsel for the defendant then and there excepted."

The jury having been sworn in the case, Orson Randall, among others, was called as a witness for the people, and on his cross-examination testified that he "had learned that a civil action has been commenced in his name, against the defendant, by Mr. Coe, as attorney, for flowing witness' land. Had given orders to have a suit commenced, but did not mean to have it commenced so soon. Did not know that the civil suit had been commenced until the former trial of this cause, in June, 1855. The civil suit has been pending since before the finding of this indictment. There were several other suits commenced by

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other parties, against the defendant, for flowing land, about the same time, as witness has understood."

The counsel for the defendant then asked the witness "was there any agreement between you and other persons who have brought such suits against the defendant, to suspend the prosecution of them until this suit should be decided?" Which question was objected to by the counsel for the People, and the objection sustained by the court, and the defendant's counsel excepted.

The defendant's counsel then offered to prove by this witness, that after the commencement of the civil suits spoken of by witness, against the defendant, there was an agreement or understanding entered into between the several plaintiffs in such suits (including the witness), to the effect that the prosecution of the civil suits should be suspended, and that they should procure the finding of this indictment, and carry it on to judgment, and thus get the defendant's dam removed; which proposed proof was objected to by the counsel for the People, and the objection sustained by the court, and the defendant's counsel excepted.

After the prosecution had rested, defendant gave in evidence the record of the case of The People *v.* William Aldrich, Hiram Shoudler, and Martin Barnhart, indicted in said Circuit Court for nuisance, which record showed a trial and an acquittal, May 1st, 1846.

Henry C. Gilbert, was then called, and sworn as a witness on the part of defendant, and testified as follows:

"I was the prosecuting attorney of this county in 1845 and 1846. I recollect the indictment found against this same dam; was prosecuting attorney at the time. There never was but one indictment found against this dam while I was prosecuting attorney. William Aldrich, Hiram Shoudler, and Martin Barnhart, were the proprietors of this dam, and they were the defendants in the former indictment."

The defendant's counsel then asked the witness, "what

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particular matters and questions were litigated upon the trial of the said indictment against the said Aldrich, Shoudler, and Barnhart?" To which the counsel for the People objected; and thereupon defendant's counsel stated to the court, that they proposed to prove, that on the trial of said Aldrich, Shoudler, and Barnhart, the question actually litigated was, whether the dam was or was not a nuisance, and that no question about the ownership or occupation of the premises, by the said Aldrich, Shoudler, and Barnhart, was raised or made on said trial, nor any other question except that of nuisance or no nuisance. But the court sustained the objection to such evidence, and defendant excepted.

The proof being closed, defendant's counsel requested the court to charge the jury, among other things:

"That the record evidence of the trial and acquittal of the proprietors of this same dam, upon a former indictment for nuisance, is competent evidence of the fact that, at the time, said dam was not a nuisance, and that if the jury believe from the record that the dam was not a nuisance at that time, they must be satisfied from the evidence that it has become a nuisance since, by means of some change in its condition, or in the manner of using it.

But the court charged that the verdict on the trial of the indictment against the former owners of the dam had nothing to do with the present trial; that the question for the jury in the present one was, whether the dam was a nuisance while in possession and under the control of the defendant, as charged in the indictment. To which charge exception was taken.

The jury having found defendant guilty, a motion was made for a new trial, based in part upon causes shown by affidavits, which motion was denied by the court, and the following order entered:

"It appearing to the court that the said Lorenzo D. Crippen is duly convicted, as charged in the indictment in

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this cause, of having, on the first day of June, in the year one thousand eight hundred and fifty-three, and after, at Girard, in the county of Branch, and in and upon a certain stream or water-course there, and being known as the Coldwater River, keep, continue, and maintain a public nuisance, by means of the continuance and maintenance of a dam or obstruction in and upon or across said stream or water-course, which was and is raised above its natural height, and whereby a great quantity of both standing and fallen timber, trees, logs, brush, and underbrush, and other vegetable matter, was and is overflowed, inundated, and covered with water, and by reason of which divers noisome, offensive, unwholesome smells, stenches, and exhalations were from thence emanated, issued, and sent forth, so that the air then and there was and is greatly filled and impregnated with the said smells, stenches, and exhalations, and was and is rendered and become corrupted, offensive, unwholesome, and uncomfortable, to the great damage and common nuisance of all the citizens then and there inhabiting and being and residing, going and returning and passing through said streets and highways, and along and across said stream or water course:

"It is therefore, on motion of Egbert K. Nichols, prosecuting attorney, *Ordered*, That said dam nuisance be abated and entirely demolished and removed, and that the said dam or obstruction be completely and effectually demolished, destroyed, and removed.

"And it is further *Considered and Ordered*, That the writ of the People of the state of Michigan issue out of and under the seal of this court, directed to the sheriff of the county of Branch, commanding him to take sufficient aid and assistance, and repair forthwith to the place where the nuisance, or cause of the nuisance, hereinbefore described, may be, and the same then and there remove, effectually destroy, demolish and wholly abate, and of his doings thereon make due return."

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T. Romeyn, for plaintiff in error.

That the court erred in overruling the challenge to Beall as a juror, counsel cited:—1 *Mich.* 286; 16 *N. Y.* 503; *Whart. Cr. L.* § 2375; *Arch. Cr. Pl.* 359. That Gilbert's evidence was competent:—3 *Hill*, 485; 18 *Johns.* 352.

J. M. Howard, Attorney General, for the People.

As to the challenge to Beall, the Attorney General cited: 1 *Burr's Trial*, 416; *Whart. Cr. L.* §§ 2978, 3014; 4 *Wend.* 229. That the proposed evidence from Gilbert was incompetent, since the former acquittal or conviction, even if defendant had been a party, would have been no answer to the present indictment:—*Whart. Cr. L.* § 2367.

MANNING J.:

Defendant was indicted for a public nuisance, and on his conviction, an order was made by the court, under § 1347 of Compiled Laws, for removing the nuisance, which is a mill dam; and the case is before us on a writ of error.

A question arose on the argument, whether the order for the removal of the dam was a final judgment on which a writ of error would lie. We think it is. A judgment is the decision or sentence of the law, given by a court of justice or other competent tribunal, as the result of proceedings instituted therein:—1 *Bouv. Inst.* 264: and the statute relative to writs of error uses the words "final judgment or determination."

The punishment for a public nuisance is imprisonment or fine, or both, under section 5958 of Compiled Laws, and, in the discretion of the court, the destruction or removal of the nuisance, when it is injurious to public health, at the expense of the defendant, under the direction of the Board of Health of the township:—*Comp. L.* §1347

The removal of the nuisance is not a necessary part of the punishment. It is left discretionary with the court,

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It is a power that may or may not be exercised; but when exercised, it must be at the time of imposing the fine or imprisonment, and form a part of the same judgment. We can not think the Legislature intended the power should continue to exist after defendant had been fined or imprisoned, as it would leave it in the power of the court, at any time thereafter, to inflict a second punishment. Nor can we suppose it the intention of the statute that the order should precede the judgment for imprisonment or a fine, as it would involve the absurdity of a double punishment, or of two distinct judgments, each punitory in its nature, given at different times, for one and the same offense.

For these reasons, as there is no judgment for imprisonment or a fine, we regard the order for the removal of the dam as erroneous. And here the question arises, whether, the error being in the judgment itself, and not in a part of the record preceding the judgment, we can do any thing more than reverse the judgment. We clearly have no power to correct the error by rendering such judgment as the court below should have given; and cases were cited to show the record cannot be remitted to the court below for that purpose: — 2 *Met.* 419; 5 *B. & C.* 395; 7 *Adol. & El.* 58.

We should feel bound by these cases, if the plaintiff in error had placed himself in a position to demand, as a matter of strict right, a reversal of the judgment on the ground stated. This he has failed to do, for no complaint is made by him of the judgment itself, in his assignment of errors, and if any of the alleged errors assigned on the bill of exceptions are sustained, the judgment may be reversed on that account, and the cause be remitted to the court below for a new trial.

Twenty one errors are assigned in all. Five of them, from seventeen to twenty one inclusive, are errors alleged to have been committed by the court, in refusing to grant

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a new trial. The affidavits on which the motion was made, have been returned with the record and bill of exceptions into this court; but as they form no part of the record, or bill of exceptions, we can not look into them for the purpose of determining whether the court erred or not in denying the motion.

All of the other assignments of error are on the bill of exceptions. The first and second are on the refusal of the court to allow one of the jurors to be asked what his opinion was respecting mill dams generally, in that part of the country; and in permitting him to be sworn as a juror, after stating that he had formed an opinion as to whether mill ponds in that part of the country were nuisances, &c. The bill of exceptions states, that after the jury had been called, the court asked defendant's counsel if he had objection to any of the jurors, and that he asked them whether they or any of them had formed or expressed any opinion respecting the guilt or innocence of the defendant, of the charges contained in the indictment; and that one of the jurors stated that he had formed, and had, an opinion as to whether or not mill ponds in that part of the country, with which he was acquainted, were nuisances, when the water covered a large surface, &c. The defendant's counsel then asked, What is your opinion respecting mill dams generally in this part of the country? The question was objected to, and the objection sustained by the court. Defendant's counsel then objected to the competency of the juror, which was also overruled. It does not appear the juror was challenged, or that his answers to the questions put to him were on oath. The whole proceeding was irregular. He should have been challenged, and sworn to answer such questions as might be put to him, touching his competency as a juror in the cause. As this was not done, there is no question of law in this part of the bill of exceptions to be reviewed.

The third error assigned, is that Lucius Beall was al-

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lowed to serve as a juror. He was challenged, and on his *voir dire*, stated that he had formed, and had, an opinion that mill dams generally in that part of the country were nuisances, and created malaria, and thereby produced disease; and when the water is dammed up, and the pond covers a large surface, and is filled with vegetable and other filthy or decaying matter, it is a cause of disease: that all the mill dams with which he was acquainted, he believed to be nuisances, and that they produced disease: that he was acquainted with only three or four mill dams in that section of the country, and he believed that all the mill dams with which he was acquainted were nuisances, and produced disease and sickness; that he was not much acquainted with the dam in question, and had not formed or expressed any opinion regarding it.

It is quite evident that, with his preconceived notions against mill dams in that section of the country, he could not sit and hear the evidence and weigh it with the impartiality a juror should. The question of nuisance or no nuisance is one of fact to be found by the jury; and he says that, in his opinion, mill dams generally in that part of the country are nuisances, and produce disease, and that all the mill dams with which he is acquainted, he believes to be nuisances. By this we understand that, in his opinion, as a general rule, mill dams are nuisances, and such as are not are exceptions to the rule. We think the juror should have been rejected.

The court likewise erred in not permitting defendant's counsel to ask Randall, a witness for the People, whether there was not an agreement between him and others who had sued defendant for flowing their land, to suspend the prosecution of their suits until defendant was tried on the indictment; and also in not allowing defendant to prove by the witness that, after the civil suits were commenced, there was an agreement between the parties to such suits to get defendant indicted, and in that way procure a removal of

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the dam. The evidence was admissible to show the interest of the witness in the public prosecution, and the influence it might have on his testimony for the People.

The court should have permitted defendant to prove by Gilbert, that Aldrich, Shoudler, and Barnhart, were acquitted on the merits on the trial of the indictment against them for a nuisance, when they were the owners of the dam. The evidence should have been admitted to go to the jury for their consideration, in connection with the record showing their acquittal. As two distinct facts must be proved to sustain an indictment for a nuisance, viz: the nuisance, and defendant's connection with it in a way to make him criminally liable, it was competent for defendant to show, in the way he proposed, on what ground the acquittal was had.

And the court afterwards erred in charging the jury that the former indictment and acquittal under it had nothing to do with the pending prosecution. The court, we think, should have charged, that the record of the former prosecution was evidence the dam was not a nuisance at the time the indictment mentioned in it was found, but not that the dam had not since become a nuisance, by some change in the use of it, or otherwise.

Judgment must be reversed, and a new trial ordered.

The other Justices concurred.

Alfred Tivey, Treasurer, &c., v. The People on the relation of Townsend North.

Where an act of the Legislature appropriated highway taxes collected in a certain town, among others, to a special purpose, and appointed commissioners to disburse the same, but before the taxes had been paid over, though after legal proceedings commenced by the commissioners to compel the payment, the act was amended by striking out all that related to such town, and the amendatory act contained no saving of rights accrued or proceedings commenced;—*Held*, that the right, under the original act, to the moneys collected in such town, was thereby terminated.

Heard April 26th, 27th & 28th. Decided May 4th.

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TIVEY v. THE PEOPLE.

Error to Tuscola Circuit.

February 10th, 1855, an act was passed by the Legislature, providing that, for the purpose of improving a highway from Lower Saginaw to the village of Vassar, in Tuscola county, and from thence to some point to be selected near the center of town ten north of range eight east, with branches to the village of Goodrich, and to the village of Lapeer, all the non-resident highway taxes which should be assessed within the limits of the surveyed townships, through or into which such highway should pass, excepting the south half of the township of Tuscola and certain other specified territory, be appropriated for the period of five years; that Townsend North, and three other persons named, be appointed commissioners to superintend the expenditure of the moneys for such road; that the same be expended within the limits of the county in which it may have been collected, and that any overseer of highways or township treasurer having received any portion of such tax, by way of commutation, should, on demand by such commissioners, or either of them, pay the same over, and the receipt of such commissioners, or of either of them, should release such overseer or treasurer from any further liabilities therefor.

May 28th, 1857, North applied to the Circuit Court for the county of Tuscola, for a mandamus, to compel the plaintiff in error, who was township treasurer of Tuscola township, to pay over to him the non-resident highway taxes received by plaintiff in error, from the north half of said township, for the years 1855 and 1856, alleging that some had been paid, which plaintiff in error refused to pay over on demand.

An alternative mandamus having been issued, plaintiff in error showed cause on the return day thereof; and an issue of fact having been joined on the return, the parties proceeded to a trial of that issue March 9th, 1859.

Before this trial, on February 9th, 1859, the Legisla-

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ture passed another act, which was ordered to take immediate effect, and which amended the act of 1855 by excepting therefrom the township of Tuscola, and repealing all acts and parts of acts "which contravene or are inconsistent with" the act as amended. And plaintiff in error insisted, among other defenses, that the passage of this act terminated all right on the part of the commissioners to demand and receive from him the moneys in controversy. And a peremptory mandamus having been awarded in the court below, as prayed, he now brought error.

D. Walker, for plaintiff in error.

T. J. Wheeler, and *T. W. Lockwood*, for defendant in error.

CHRISTIANCY J.:

The non-resident highway taxes which the township treasurer was, by the mandamus, commanded to pay over to the relator, were not raised by virtue of the act of February 10th, 1855, but were assessed and collected under the general highway tax law; and this general law, but for the act of 1855, required the money to be expended in the several road districts, in which and for which it was raised. The act of 1855 undertook to divert the tax, after it should be collected, from the purposes for which it was assessed, and to authorize its expenditure in any part of the county upon the particular road described in the act, by commissioners "whose duty it shall be to superintend the expenditure of such sum of money."

The act does not assume to operate upon the taxes till actually collected and in the hands of the township treasurer, or the overseers of highways; but when so collected, authorizes the commissioners to demand it, and requires the treasurer and the overseers, in whose hands it may be, to pay it over to the commissioners, for the purposes of the act. The commissioners are not authorized to make contracts on the faith of the money before received

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by them, but merely to superintend its expenditure, after they have received it.

Admitting, for the purposes of this case (without intending to affirm) the constitutional validity of this very questionable legislation, and admitting also the right of the relator alone, as one of the commissioners, while this act remained in force, to call for this money, and to institute this proceeding, still it is manifest that both his right to demand, and the duty of the treasurer to pay to him, this money, were created by the act of 1855, and rested upon that alone. Independent of this act, neither the right nor the duty had any existence.

The commissioner never obtained possession of the money: it still remains in the hands of the treasurer, who disputes his right: and while this dispute is in progress, and in course of litigation, the Legislature, by the act of 1859, amend the act of 1855, by striking out from that act the township in which the taxes in question were raised, and by repealing "all acts and parts of acts which contravene, or are inconsistent" with, the act of 1855, as amended, without any saving of rights accrued or suits commenced. If the money were now to be paid to the commissioners, they could expend no part of it in this township, where before they might, if they had seen fit, have expended the whole.

As the right of the commissioners, and the duty of the treasurer, were created by and entirely dependent upon the act, when that ceased to exist, the right and the duty expired with it. — See *Town of Guilford v. Supervisors of Chenango*, 3 *Kern.* 143; *Commonwealth v. Duane*, 1 *Binney*, 601; *Stoever v. Immal*, 1 *Watts*, 258; *Norris v. Crocker*, 13 *How.* 438; *Hampton v. Commonwealth*, 19 *Pa. St.* 329; *Williams v. County Commissioners*, 35 *Me.* 345; *Butler v. Palmer*, 1 *Hill*, 330; *Sedgwick on Const. and Stat. Law*, 129. This disposes of the case, and leaves us no apology for the discussion of the other questions relied upon by

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the plaintiff in error. The judgment of the Circuit Court must be reversed.

The other Justices concurred.

Edward A. Elliott and others v. George Miller.

A parol agreement, by a tax collector, to receive in payment of taxes a draft of his creditor upon himself, is not valid—our statute requiring the acceptance of a draft to be in writing.

But such tax collector, if the draft had been accepted by him, would have had no right to receive it in payment of taxes, since the taxes are due not to him, but to the public, and claims against him are not a legal tender for or offset against the taxes.

An agent of a tax collector having received in payment of taxes a draft upon the collector, and on the collector refusing to accept or allow the same, having paid over the amount of the tax himself, is a holder of the draft for value, and entitled to collect the amount from the parties thereto.

Heard May 2d. Decided May 4th.

Error to Wayne Circuit, where Miller brought action against plaintiffs in error as drawers and endorsers of a draft, of which the following is a copy:

"Thomas Anderson: Please pay to order of S. Griggs & Co., one hundred dollars, and charge to account of

ROWE & Co."

January 26, 1858.

(Endorsed) "S. GRIGGS & Co."

On the trial in the court below, before a jury, Nathan B. Carpenter was called as a witness for plaintiff, who testified that the draft was received by the witness, of the defendant Griggs, as so much money towards the payment of his, Griggs', city taxes; that the witness was acting in collecting taxes in the second ward of Detroit, as the agent, for this purpose only, of Thomas Anderson, the person on whom said draft is drawn, and who was a collector of taxes in said city: that witness received said draft or order, and some money, and gave Griggs a receipt signed

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by Anderson therefor; that when witness paid Anderson the money he had collected for taxes, he presented the draft to Anderson, who refused to accept it or allow witness for it, and witness gave his own money for the draft; that when witness received the draft, Anderson was absent from Detroit, and he presented the draft within a day or two after he received it from Griggs: that on the same day the draft was presented to Anderson and acceptance refused, he notified the drawers and endorsers of the presentment and refusal, and that he looked to them for payment: that witness transferred the draft to plaintiff some months after its payment was refused; that witness saw Elliott and Griggs several times concerning the draft after Anderson refused acceptance, and they promised to see that Anderson accepted it, or pay it themselves. Witness collected taxes for Anderson on a commission of half the per centage allowed the collector, who held him responsible for all collections. He never asked or obtained Anderson's authority to take this draft from Griggs previous to receiving it, but took it reluctantly, on the assurance of Griggs that it should be all right.

The plaintiff having rested, the defendant Griggs was sworn as a witness on behalf of the other defendants, and testified that Carpenter, having the city tax roll of Detroit for the second ward, called on witness for his taxes, and witness not having within one hundred dollars of the amount sufficient to pay said taxes, applied to defendant Elliott, one of the firm of Rowe & Co., the drawers of said draft, for a loan of one hundred dollars; and he, Elliott, not having the money, told witness that he would give him an order on Anderson for the amount, to which witness replied, that he would see Anderson, and if Anderson would take it as money, witness would take the order; that thereupon he saw Anderson, and asked him if Rowe & Co.'s order for the amount would be the same as money; and Anderson told witness it would be right; that shortly after Carpenter cal-

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led again for the taxes, and witness got this order of Rowe & Co., and endorsed it and handed it to Carpenter, who gave witness a receipt in full for the taxes; that Rowe & Co. charged the amount of draft to witness, and witness paid it: that witness saw Anderson three or four times after this, and he, Anderson, said nothing about it.

Defendant Elliott was also sworn as a witness for his co-defendants, and testified to the foregoing conversation substantially as stated by Griggs; and stated further that Anderson was indebted to Rowe & Co. in about four hundred dollars, for money loaned, at the date of said order.

Certain questions were put on behalf of defendants, to both Griggs and Elliott, with respect to the time of notice of non-payment of the draft, which were overruled by the court, and exception taken; but the questions arising thereon were not passed upon by this court.

The evidence being closed, the defendants asked the court to charge the jury as follows:

First: That if the jury believe that Anderson informed defendant Griggs that said draft would be allowed by him, for his, Griggs', taxes, and that said draft was drawn by Rowe & Co., and given by them to Griggs, and by him delivered to Carpenter, under this understanding with Anderson, the plaintiff can not recover.

Second: That if the jury believed that the draft was drawn, endorsed and delivered to Carpenter, in pursuance of Anderson's statement to Griggs, it operated as payment of the draft in question, and the plaintiff can not recover.

Both which requests were refused by the court, and exception taken.

Holbrook & Bishop, for plaintiffs in error.

E. N. & O. B. Wilcox, for defendant in error.

CAMPBELL J.:

It is claimed by the plaintiffs in error, that the agree-

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ment testified to by Griggs, as made with Anderson, for the acceptance of Rowe & Co.'s draft, made the delivery of it to Carpenter, as Anderson's agent, equivalent to its payment, and that it then ceased to have any existence as a security.

The statutes of this state (*Comp. L. p.* 408) provide that "no person within this state shall be charged as an acceptor on a bill of exchange, unless his acceptance shall be in writing, signed by himself or his lawful agent." Anderson's parol agreement therefore was not valid, and the draft, when it came into Carpenter's hands, was unaccepted, and subject to the rules of law applicable to such paper. We do not however recognize the right or duty of Carpenter to have received it in payment of taxes, had it been accepted. Taxes are due to the public, and not to the tax collector individually, and claims against him are not a legal tender for, or offset against, such charges.

It can not be claimed that Carpenter was not a holder for value of the draft. He received it in lieu of money, on the assurance of Griggs that it should be all right, and was obliged to pay the taxes to Anderson, in money, out of his own pocket. And he was subsequently recognized as its owner, by all the parties, and they promised to pay it unless Anderson should accept it himself. In view of the subsequent promise, the questions raised upon the refusal to allow Griggs and Elliott to testify when they were notified, become unimportant, and were waived by counsel.

There was no error in the judgment below, and it must be affirmed with costs.

The other Justices concurred.

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Jacob S. Farrand v. The Collins Iron Co.

Where, after a case reserved for the opinion of this court has been noticed for hearing, an addition of specific questions is made to it by the Circuit Judge without the consent of one party, such party will not be required to go to a hearing of the case upon the notice previously given.

The original files of this court should not be altered, even by consent of parties, without the leave of the court. If an addition is desired, it should be done by stipulation or other separate paper, without changing the original.

Heard May 8th. Decided May 9th.

Cornelius O'Flynn and another v. James E. Eagle and another.

Where, after error assigned in this court, the defendant in error, without the leave of this court, obtains an amendment to the record in the court below, with a view to obviate the error assigned, this court will neither amend the transcript to make it correspond with the amended record, nor award a certiorari to bring up the amendment.

The case of *O'Flynn v. Holmes*, 7 *Mich.* 454, approved.

Under the circumstances of this case, the defendant in error allowed to make a new application to the court below to amend, with leave to plaintiff in error to discontinue at the costs of defendant in error.

Heard April 24th. Decided May 12th.

Error to Wayne Circuit, where judgment was rendered in favor of defendants in error, against O'Flynn, as endorser, and Daniel Finn, the other plaintiff in error, as maker of a promissory note. The error assigned was, that there was no service of process upon Finn. After error assigned, the court below, on motion of defendants in error, amended the record so as to show judgment against O'Flynn only.

J. S. Newberry, for defendants in error, now moved that the record in this court be amended to correspond with the record below, on presenting a certified copy of the amendment made below since error brought; or, instead thereof, that this court award a certiorari to bring

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up the record as amended. He contended that the amended record was now the only record in the case:—25 *Conn.* 496; 25 *Ala.* 644: that the amendment may be brought up by certiorari:—2 *Scam.* 539; 2 *Bibb*, 88; *Ibid.* 7; 8 *Cow.* 746; 4 *Cow.* 91; 25 *Ala.* 644: or this court may amend the transcript to make it correspond with the amended record:—2 *Cow.* 408; 2 *Ld. Raym.* 1570; 2 *Strange*, 869; 3 *Johns.* 95; *Ibid.* 526; *Coleman's Cas.* 41; 7 *Wend.* 229; 1 *Cow.* 65; 4 *M. & S.* 94; 15 *Johns.* 318; 3 *Ind.* 107; 2 *Stew.* 492; 9 *Port.* 193; *Ibid.* 252; *Burr.* 2449, 2730; 2 *Johns.* 184; 1 *Gall.* 257.

C. O'Flynn, contra, relied upon *O'Flynn v. Holmes*, 7 *Mich.* 454. He insisted, also, that defendants were too late in their application, the assignment of errors having been filed nearly a year ago.

CAMPBELL J.:

The rule adopted in *O'Flynn v. Holmes*, 7 *Mich.* 454, was, we think, correct, and we are disposed to adhere to it. It is true, the amendment made in the court below, in that case, was not made from the record, but from matter *aliunde*, while here it is based entirely upon the files and records; but we think there is no difference in principle, so far as our action is concerned. If we recognize the amendments as binding at all on us, when made without a *remittitur*, we can not distinguish in favor of either kind; because when we once sanction them on our own records, we can not review the decision of the court below upon the propriety of granting them:—*Mellish v. Richardson*, 9 *Bing.* 125; *Matheson's Admrs. v. Grant's Admrs.* 2 *How.* 263.

There are some amendments which will be supplied in any court, in order to make the record read consistently; and where it is unnecessary to make any amendment in form at all. Such was the case of *Emery v. Whitwell*, 6

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Mich. 474. In all other cases, the amendment must be made in the court below. And we have already intimated, on several occasions, that no obstacle should be thrown in the way of permitting such amendments, within a reasonable time, wherever it is made to appear that they are proper, and likely to be made:—*Farrand v. Bentley*, 6 *Mich.* 281; *Sweetzer v. Nye*, 5 *Mich.* 33; *Scribner v. Gay*, 5 *Mich.* 511.

But there are, we think, very strong reasons against permitting cases to be disposed of without our previous assent, by the courts from which they are removed. A party who considers himself aggrieved, has a right resort to this court, by writ of error or other proper proceeding; and this court becomes possessed of the case as it stood when removed. To permit amendments after such removal, and without our sanction, to be made at the discretion of the court below, would be, in effect, to surrender to them our appellate jurisdiction, and to enable them to oust us of it at their pleasure. It is very likely that abuses would but rarely happen; but if they should happen, we should be powerless. And while we are disposed, in all reasonable cases, to give all proper facilities for amendments, we can see no propriety in recognizing the principle that an appellate court can have its hands tied by the court from which an appeal is taken.

There are several reported cases in which it is asserted, by very able judges, we admit, that an appellate court should recognize the amendments made, after error brought, in the court below. So far as our observation has gone, these assertions are found generally, if not universally, in the decisions of the courts making the amendments. We have met with but two cases in which the question arose in the appellate court, in any direct form, concerning the binding force of such amendments. In *Richardson v. Mellish*, 3 *Bing.* 334, 336, the Common Pleas amended a record while the case was pending in error in the King's

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Bench. In 7 *B. & C.* 819, is a report of an application in the King's Bench, to allow the amendment to be added to the transcript in that court. The court divided in opinion as to whether it should be permitted at all; and without deciding the question, allowed it to be done with an explanation of the facts, in order that the House of Lords might determine whether it was proper. In the House of Lords, it was held, on the opinion of the Judges (9 *Bing.* 125), that inasmuch as the King's Bench had permitted the amendment to get upon their record, it was incompetent to inquire how it got there; and so they declined to decide whether the amendment of the King's Bench record should have been allowed. The other case is that of *Cheetham v. Tillotson*, 4 *Johns.* 499. In that case the Supreme Court had, after error brought, allowed a substantial amendment, and a motion was made to have it brought into the Court of Errors, by allowing the transcript to be remitted for that purpose. The court refused to permit it. We can not learn that the rule has been changed in New York, and it seems to us entirely reasonable.

If it were proper to make distinctions, the present case would, perhaps, warrant a relaxation of the rule. But we think the principle should be adhered to. Both motions are denied. But under the circumstances, the defendants may have an order permitting a new application to the Circuit Court, with leave to the plaintiff in error to discontinue. He is entitled to his costs if he does so, under all the decisions; and this seems to have been conceded by counsel. He is also entitled to the costs of one motion.

MARTIN CH. J., and MANNING J., concurred.

CHRISTIANCY J.:

I am not able to agree with my brethren, in the decision of this motion. The case of *O'Flynn v. Holmes*,

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7 *Mich.* 454, upon which my brethren base their decision in this case, was but little discussed, and no cases cited. I assented to the decision in that case with reluctance, and without being satisfied of its correctness. But as it was a question of practice, I did not at the time think it of sufficient importance to justify a dissenting opinion.

Subsequent reflection, however, and the discussion of the present case, have satisfied me, that the course of practice there adopted seriously affects the rights of parties, and is calculated to check the powers of amendment given by the statute, which, I think, should be liberally exercised in cases like the present, where the amendment is justified by the facts, and is in affirmance of the judgment.

Without going fully into the effect of this ruling in other cases, I will merely say here, that when the only error complained of in the record is such as that court, upon any showing of facts, was competent to amend, and the certificate of that court is presented, showing that the amendment has already been made since the transcript was sent up, I can never consent to reverse the judgment for such error, unless it be shown that the amendment has been improperly allowed. And if we can not act directly upon such certificate as authentic evidence (which I think we may; See 2 *Cow.* 408; 2 *Ld. Raymond*, 1570; 2 *Strange*, 869; 7 *Wend.* 229; 3 *Ind.* 107), the fact that the amendment has already been made in the court below, ought to be sufficient ground for an order sending down the record to be amended, or for a certiorari to send up the record as amended; and it is of little consequence which of these methods is adopted, as both are equally safe and convenient. And I confess my entire inability to see why the defendant in error should be required to show any further cause for the amendment, to entitle him to such order or certiorari.

The fact that an amendment has been made, which that court had a right, upon a proper showing, to make, must, it seems to me, be quite sufficient ground for the amend-

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ment, until something is shown to the contrary. The opposite view, it seems to me, presumes in advance, and without proof, that the amendment has been improperly granted; and assumes that the court below is not capable of judging correctly upon the question of its propriety, without our previous advice and instruction; though all the facts upon which the question depends occurred in that court, and not before us.

If the entire jurisdiction of that court over its own record ended with the return of the transcript to this court, under the writ of error, there might be good ground for such a position. But such is not the fact with the record proper, whatever it may be with a bill of exceptions, the original of which, under the statute, is required to be returned to this court. Execution may be issued on the judgment in the court below, notwithstanding the writ of error, unless bond be given; and the issuing of execution may often involve the necessity of amending the record. Both in England and in this country, in cases where a transcript only is sent up on error, the record, for all purposes of amendment, is always regarded as still remaining in the court below. See the authorities cited by counsel for defendants in error: — 2 *Sellon's Pr.* 410; *Graham's Pr.* 667, 668; 2 *Arch. Pr.* 262; *Tidd's Pr.* 652.

The rule adopted by my brethren will not recognize the amendment made in this case, though the record should now be remitted and the same amendment returned to us on certiorari, because not made by our previous authority; and the amendment must be again made in that court to entitle it to our recognition. Why require of the court below the idle ceremony of such a repetition?

Will the order of this court place that court under any greater obligation than the law imposes? Is it quite respectful to that court to indulge such a supposition, or to require it to repeat the amendment?

In reference to the showing of cause in this court, for

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an amendment to be made in the court below, this will, of course, be confined to such amendments as can only be made on cause shown in that court, since all amendments which may be made without showing cause there, can be made here, or the record treated as amended without any amendment in fact. Hence, this rule imposes upon the defendant in error the expense, labor and delay, of first showing cause in this court, and then in the court below.

If the amendment has not yet been made by that court, whatever may be the showing here, it is by no means certain that when the parties come to be heard, as they must be, in that court, that the amendment will ever be made; and the cause has been delayed, and the expense of the proceedings incurred, to no purpose. All this is avoided by acting upon the amendment already made. And if amendments of this kind, made in the court below, are to be looked upon with suspicion, the better corrective, I think, would be to adopt the rule that we will not in the future recognize or receive as a part of the record an amendment made without a previous application to this court, unless accompanied with the reasons or grounds upon which the amendment was made, nor unless those grounds shall appear to us sufficient.

As to the stage of the case in which an amendment is to be made, and the question of diligence, whenever this court have, in any way, reasonable ground to believe that the only error complained of in the record has not occurred in fact, and that an amendment might be made in the court below, according to the facts, so as to remove the error, it is, I think, the duty of this court, in in any stage of the cause, to take the proper means to have the record amended. Delay in the application may be good ground for imposing terms, but can not justify the reversal of a judgment for errors which, we have good reason to believe, have no real existence.

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Harvey Montgomery v. Henry A. Wight and another.

Under the Canadian statute (20 *Vic.* c. 8, §4,) which requires that a mortgage of chattels "shall contain such efficient and full description thereof that the same may be thereby readily and easily known and distinguished," a mortgage of a horse, describing it simply as "one sorrel horse," is, as to others than the parties to it, void for want of a sufficient description.

Laws for recording chattel mortgages can have no force beyond the jurisdiction of the sovereignty enacting them; and the record of a chattel mortgage in Canada is, therefore, no notice to the creditors of the mortgagor who shall find the property in his possession in Michigan. And neither the statute of Canada nor of Michigan dispenses with the necessity of possession by the mortgagee, except where notice can be rendered effectual by recording the mortgage.

Where, therefore, a chattel mortgage, given by a resident in Canada, was properly put upon record as required by the Canadian law, but the mortgagor was left in possession of the mortgaged property, and brought the same into this state, where it was taken and sold on execution against the mortgagor;—*Held*, that the title under the execution sale must prevail over that under the mortgage.

Heard May 4th. Decided May 12th.

Case reserved from Wayne Circuit Court as follows:

"This was an action of replevin, brought to recover one chestnut stallion called *Jacksonian*."

"There was evidence that on the 20th of March, 1858, F. W. Backus was the owner of the horse in question; that on that day he executed a chattel mortgage — but without any change of possession of the property — conveying this and other property to S. P. Brady. The mortgage was duly filed in the clerk's office of the city of Detroit, and was in force and unpaid on the 11th of August, 1858. Prior to that time, and after May, 1858, Backus removed a part of his property, and this horse included, to the town of Anderdon, Canada, with the intention of residing, and resided there without his family until December, 1858, when his family joined him, and he became a permanent resident. On the 11th of August he executed a mortgage, also without change of possession, to the plaintiff, to secure a *bona fide* indebtedness. By this mortgage several horses are conveyed; they are therein described as follows: "One brown mare, one sorrel horse,

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one bay horse, one brown colt;" and after describing household goods and other property, the description concludes with these words: "and all other goods and chattels and personal property now being at the residence of said Backus, in Onslow Cottage, in the township of Anderdon." This mortgage was executed, verified and filed, in accordance with the statutes of Canada relating to chattel mortgages, which statutes being the laws of Canada for 1857, are by consent considered a part hereof, and were in evidence, and are sent herewith.

"It was in proof on the trial, subject to objection, that on the 11th of August, 1858, Backus had no other chestnut or sorrel horse; that the horse replevied was then — at the time of the mortgage to plaintiff — a sorrel, but had changed in color, and become at the time of the replevin a chestnut. And that the horse was then, *i. e.* when mortgaged to plaintiff, at the place of Backus, and that Backus had not there, or at any place in Canada, any other sorrel or chestnut horse.

"It was also in evidence that on the 20th day of March, 1859, the mortgage so given to Brady had become void for want of a renewal thereof, as provided for by the statutes of this state.

"It was in proof that Backus brought the horse to Detroit, on the 2d day of May, 1859, for the purpose of having him trained, where he remained until replevied; that the defendants, having a judgment against Backus, issued execution thereon, and levied upon this horse on the 16th day of June, 1859; they became the purchasers at the execution sale, and held the horse by virtue thereof at the date of the writ of replevin.

"Upon these facts the following questions arise and are reserved for the opinion of the Supreme Court thereon:

"1. Was it competent for Backus to execute the mortgage to Montgomery while the Brady mortgage was in force and unpaid?

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"2. Was the description of the property contained in the Montgomery mortgage sufficient to render the mortgage valid under the statutes of Canada, above referred to?

"3. Was it competent to aid the description by the parol proof which was received subject to objection, and hereinbefore mentioned?

"4. If the mortgage given by Backus to Montgomery was valid under the statutes of Canada, did the lien thereby created cease when the property was brought into the state of Michigan?

"5. Did the mortgage given to Montgomery, if valid under the laws of Canada, protect the property, when brought into the state of Michigan, from levy and sale under the defendant's execution?

"6. If the mortgage given to Montgomery did not protect the property from levy and sale under the defendant's execution, would said levy and sale take priority of said mortgage?"

W. Gray, for plaintiff:

The description in the mortgage is sufficient. The statute (*Stat. Canada*, 1857, *p.* 7), is not to be construed as requiring the most perfect possible description, for that would defeat all mortgages. The statute only requires good faith, and is merely directory in this particular:— *Rose v. Scott*, 17 *Q. B.* (*Canada*) 385. And it is proper to aid the writing by parol proof which does not contradict it. The testimony given was also admissible for the purpose of identity.

If the mortgage was valid in Canada, the lien did not cease when the property was brought here. The true doctrine is this: If a contract made in one country is against the law or policy of another, it will not be enforced in the latter; but if valid where made, and might be made in the latter, it will be enforced:— *Story Confl. L.* §§ 326, 327. See 3 *Mich.* 123. A mortgage made in

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New Hampshire was held invalid against the property in Vermont, when found there in possession of the mortgagor (23 *Vt.* 284), because a mortgage without change of possession could not be made in Vermont. The mortgage was therefore against the law and policy of that state: 11 *N. H.* 64; 10 *N. H.* 46.

Wells & Hunt, and *H. D. Terry*, for defendants:

The description in the mortgage was insufficient:—*Rose v. Scott, supra*; *Lawrence v. Evarts*, 7 *O. S. R.* 194.

But if the mortgage was good in Canada, the lien ceased on the property being brought here. Though our courts are bound to recognize the existence of the liens under the foreign statute, they are not to give them a priority over other liens acquired under our own statutes:—*Story Confl. L.* §§ 323, 324, 325*d*, 325*k*, 326, 327, 388, 389; 15 *Pick.* 11; 13 *Mass.* 146; 5 *N. H.* 213; 9 *Vt.* 358; 11 *N. H.* 55; 23 *Vt.* 279. At the common law, and independant of the Canadian statute, the Montgomery mortgage would be absolutely void, for it could not be filed here. Can the Canadian statute change the rule here? Does the comity of nations require that it should have such an effect? And that the courts of this state should hold that it defeats the liens acquired by our own citizens upon the property of a debtor found here? We think not.

CAMPBELL J.:

The questions arising in this case, all go to the inquiry whether the mortgage, made by Backus to Montgomery, takes precedence of the execution sale against Backus, whereby the property was sold.

The mortgage from Backus to Montgomery was made in Canada, and, in order to be valid at all, must be sustained under the laws of Canada. It is claimed by the defendants that, under those laws, the description of the horse in controversy is insufficient.

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By the Canadian statute of 20 *Vic. C.* 3, § 4, it is declared that a mortgage of chattels, "shall contain such efficient and full description thereof, that the same may be thereby readily and easily known and distinguished."

The description in the mortgage before us is "one sorrel horse." In the case of *Rose v. Scott*, 17 *Q. B.* 385, the court of Queen's Bench of Upper Canada had occasion to apply the provision of the statute above quoted, to a chattel mortgage containing the following description, viz: "seven horses, three lumber wagons, one carriage, one pleasure sleigh, all the household furniture in possession of the said party of the first part, and being in his dwelling house; all the lumber and logs in and about the saw mill and premises of the said grantor, and all the blacksmith's tools now in possession of the said party of the first part; six cows and four stoves." The court held that nothing but the furniture, lumber and logs, could pass, as none of the other articles were described in such a way as to enable a person to ascertain their identity by inspection or inquiry, and distinguish them from other similar articles. We do not perceive in the description before us any way of distinguishing this sorrel horse from any other sorrel horse in the province, and are very well convinced that the instrument would be so construed by the Canadian courts, upon the authority cited. The object of the statute is to prevent purchasers and creditors from being deceived by ambiguous descriptions, the allowance of which would encourage fraud, and render it easy to substitute one chattel for another. As this horse had a name, that would have furnished a ready description. And any hint which would have directed the attention of those reading the mortgage to any source of information beyond the word of the parties to it, would at least have been much more satisfactory. The provision in the statute was, as is remarked in *Rose v. Scott*, "to enable third parties to ascertain what was intended to be assigned." The statute is certainly a wise one,

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and should be so construed as to make it effectual. As between the parties, the same difficulties are not likely to arise.

A more serious question, however, is whether the mortgage, if sufficiently certain, could yet avail against the levy. The defendants claim that it must yield to their execution title. The plaintiff, however, insists that we are bound by comity to protect his rights; and that his mortgage is valid here, to all intents and purposes, if valid in Canada.

We certainly should be very reluctant to deny to any party any right legally assured to him under the laws of our neighboring province, even if our common origin and friendly associations did not make the duty of extending the principles of comity a cheerful one. And in holding, as we are compelled to in this case, we are glad that we find no incompatibility between our own laws and those of Canada. We regard them both as aiming to accomplish the same object in very much the same way. They are substantially alike.

The evil which both statutes found in existence, was the facility for fraud held out by allowing mortgagors of chattels to retain possession under any circumstances. By permitting the mortgagee to hold, if he took his security in good faith, the law formerly subjected subsequent purchasers from the mortgagor to all the danger arising from his fraud, although he was enabled to perpetrate it by the permission to retain possession given him by the mortgagee. At the same time there were many cases where it was very necessary to the mortgagor to be enabled to keep possession. In order to provide for such emergencies, and at the same time protect creditors and purchasers from fraud, our statutes declare that a chattel mortgage shall be void as against them, without an actual and continued change of possession, unless the mortgage is recorded by filing a copy, with us in the city or town, and in Canada, in the proper county office. And here, as there, an affidavit of renewal must be made yearly.

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This provision for filing or registry is not intended by any means to encourage or legalize the practice of making mortgages without possession. The statute now as before, regards change of possession as the rule, and allows filing to dispense with its necessity, because filing is public notice. But we can not suppose that either statute was designed, or can be properly construed, to dispense in any case with filing and change of possession also. If a chattel mortgage of property here is made by a non-resident, our law contains no provision for filing it. In such a case a change of possession is therefore essential, and can not be dispensed with against creditors or purchasers. The Canadian law contains a provision for filing in the county where the property is, if the mortgagor is a non-resident, and also contemplates a new filing, if the property is removed from county to county. These provisions are ample, where the property continues within the jurisdiction. But neither law undertakes to provide for any notice to be effectual if the property is elsewhere, and in such contingency, the prohibition of retaining possession must be absolute, so far as it can apply at all.

We must assume that these laws were passed in view of the well settled principle, that a law can have no binding force beyond the jurisdiction of the sovereignty enacting it. A resident of Canada, while dealing in Canada, for a chattel, can not be supposed to know the law of Michigan, or to be obliged to take notice of the records in a Michigan office. A statute of Michigan requiring him to do so would be of no validity beyond our own borders. And it would be equally unreasonable to require a citizen of Michigan, at home, to take notice of files and entries in Canada. These notices can have no extra territorial force. Proceeding upon the principle that the laws must have a sensible construction, we feel constrained to hold that the rules of these laws which require a change of possession, dispense with it only where an effectual notice may be

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given. If mortgagees desire to be protected where no notice can be made effectual, they must take possession, and not allow the mortgagor to take the property where third parties have no means of ascertaining its title.

In the view we have taken of these laws, no conflict arises, and we regard our ruling as sustaining the policy of both countries.

It must be certified, that the mortgage of plaintiff is invalid as against the levy and sale under the defendant's execution, and that the latter must be allowed priority. The other questions become immaterial.

The other Justices concurred.

Augustus Pond v. The People.

The law does not require the necessity for taking human life to be one arising out of actual and imminent danger, in order to excuse the slayer; but he may act upon a belief, arising from appearances which give him reasonable cause for it that the danger is actual and imminent, although he may turn out to be mistaken. The guilt of the accused must depend upon the circumstances as they appear to him, and he will not be held responsible for a knowledge of the facts, unless his ignorance arises from fault or negligence.

Homicide *se defendendo*, in resisting an assault not made with felonious intent, is excusable where the danger to be resisted is to life, or of serious bodily harm of a permanent character, and unavoidable by other means in the power of the slayer so far as he is able to judge at the time. But he is bound if possible to get out of his adversary's way, and has no right to stand up and resist if he can safely retreat or escape.

A man assaulted in his dwelling is not obliged to retreat, but may use such means as are absolutely necessary to repel the assailant from his house, or prevent his forcible entry, even to the taking of life. And, if the assault or breaking is felonious, the homicide becomes, at common law, justifiable, and not merely excusable.

The same circumstances which excuse or justify homicide in defense of one's self, will excuse or justify it in defense of his servant.

Whenever a forcible felony is attempted against person or property, the person resisting the attempt is not obliged to retreat, but may pursue his adversary if necessary, till he finds himself out of danger. But he may not properly take life if the evil may be prevented by other means within his power.

It is immaterial to the justification of homicide in resisting a forcible felony, whether the act was a felony at the common law, or made such by statute.

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POND v. THE PEOPLE.

Private persons may forcibly interfere to suppress a riot or resist rioters; and they may justify homicide in so doing, if they cannot otherwise suppress them, or defend themselves, their families or their property.

A building thirty-six feet distant from a man's house, used for preserving the nets employed in the owner's ordinary occupation of a fisherman, and also as a permanent dormitory for his servants, is in law a part of his dwelling, though not included with the house by a fence. A fence is not necessary to include buildings within the curtilage if within a space no larger than that usually occupied for the purposes of the dwelling and customary outbuildings.

The Supreme Court can not, on reversing a judgment on exceptions, proceed to give such judgment as the facts set forth in the bill of exceptions would warrant. The court can only consider those facts as they bear upon the rulings of the court below; and order a new trial if the exceptions are sustained.

Heard April 24th, 25th, and 26th. Decided May 12th.

Error to the District Court of the Upper Peninsula, for the county of Mackinac.

The plaintiff in error was tried on an information for the murder of one Isaac Blanchard, and convicted of manslaughter.

Upon the trial, as appears from the bill of exceptions, the following facts were proved: The homicide was committed on the 18th day of June, 1859, at Seul Choix, a point of land in Delta county, which is attached to Mackinac county for judicial purposes, extending about a mile into lake Michigan, and situate near its northern extremity about seventy-five miles from Mackinac. It was inhabited by a considerable population, who were here engaged in the business of fishing. Their houses and other buildings stood in a line near to and following the shore of the lake. Amongst these were the house and premises of the prisoner, where he was carrying on the business of fishing, and was living with his wife and three young children, one of whom was a young infant, and the eldest a daughter 12 years old, together with two hired men, named Daniel Whitney and Dennis Cull. It was a long building about 16 feet square, contained but one room, and had a bark-roof, and only one window, and but one door, made of boards, which was fastened to the building with leather hinges, and opened outward; and upon the

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inside was fastened and kept closed by means of a rope attached to it and a pin near the side of the door, around which the rope was drawn and made fast.

Thirty-six feet distant from the prisoner's house, was another building of the prisoner, called a net-house. This was constructed with six posts set in the ground, having plates upon their top, and the whole was enclosed with boards an inch or an inch and a quarter thick, nailed on the sides to the posts, and on the roof nailed to the plates, and to a ridge-pole. The joints of the roof were also covered with bark, and the bark held in its place by poles extending from one end to the other. It had a board floor, and but one door, which opened directly opposite to the door of the prisoner's house. This door was made of boards, was fastened to the building with leather hinges, and upon the inside was closed and fastened by the same means and arrangement as the door of the prisoner's house above described. It also had a latch. The net-house was about sixteen feet long and fourteen feet wide; contained but one room, had a berth constructed about two and a half feet high, for the purposes of a bedstead, in the end of the building opposite that containing the door, which berth was large enough to accommodate two persons comfortably, and on which the prisoner's two hired men, Whitney and Cull, had slept regularly, up to the time of the homicide, during their employment with the prisoner, the former having been in his service two weeks, and the latter one week immediately preceding. They took their regular meals with the prisoner's family in his house, and lived as members of his family. Two of the three persons engaged in the transactions leading to and immediately connected with the homicide, David Plant and Isaac Blanchard, Jr., the deceased, resided also at Seul Choix Point, near its foot, at a place called the Harbor, Plant about a mile, and Blanchard about three-fourths of a mile from the prisoner's house. The other,

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Joseph Robilliard, resided near the end of the point, and not far from the prisoner's premises.

On Thursday, at about noon, of the same week when the homicide occurred, Plant in the presence of said Blanchard, at the house of one Downey, situate on the point, threatened in conversation with Mrs. Downey, that he must whip the prisoner or there would be a fracas. This threat was heard by the young daughter of the prisoner, who happened to be passing near at the time, and who immediately went home and communicated the threat to her mother, who thereupon immediately awakened the prisoner, he being then asleep on a bed, and communicated the threat to him in these words: "My little girl says in passing Mr. Downey's, she heard Plant say he was going to whip you." This was about 1 o'clock P. M. On the evening of the same day, at about 8 o'clock, an assembling of from fifteen to twenty persons occurred on the point, a few rods from the prisoner's house, and between the houses of Joseph Martell and a Mr. Durocher, which were about one hundred feet apart. The larger part of these persons resided at the harbor, and between the harbor and the point. They had, as Mary Pond, a witness for the prisoner, testified, been hunting for the prisoner, and had overtaken him near Durocher's house. Jerry Williams, a witness for the People, testified that he was one of the company; that he had been on board a vessel in the bay, and was returning towards the harbor; that he came there with a party of persons, and there met another party, and he could not say how many persons were present, nor how long they remained there.

In the company were Plant, Robilliard and the deceased. The prisoner was got into the company by Plant, who had called him out of Joseph Martell's house. They were sitting all around the prisoner, engaged in conversation. They surrounded him. Their proceedings thus far were observed by the prisoner's daughter, who was secreted behind Du-

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rocher's house, in order to look at them and see what they would do to her father, and she then left, and went home and reported them to her mother. Whilst the company was so assembled, Plant told the prisoner that he did not use his neighbors right; that he ought not to pitch on to men not of his size and abuse them; that if the prisoner wanted to fight anybody, he had better take a man of his size. There was no evidence of any provocation on the part of Pond by words or acts. Plant then struck the prisoner in his face with his fist—the prisoner's hat at the same time falling off—and then kicked him in his breast. The prisoner did nothing more than pick up his hat and put it on again. Then they drank whisky together, furnished by Blanchard. In a short time the prisoner, as Mary Pond expressed it, "got clear of the company." At first, as stated by other witnesses, he walked off, and then was seen running away alone into the woods. About 9 or 10 o'clock on the same evening, Plant, Robilliard and Blanchard, came to the door of the prisoner's net-house. The prisoner's two hired men, Whitney and Cull, were then asleep therein, and when they went to bed that evening, the door was fastened to the building upon its hinges, and it was closed and fastened as usual on the inside by means of the rope above described, which was made fast around a pin or nail near the side of the door.

Whitney was awakened by the walking of Plant on the floor, and he then saw the door lying outside on the ground, torn from its hinges, and the pin or nail that had held the rope was also broken. Plant first went up to the bed, took hold of Whitney's arm and asked who he was. Whitney told him, and then Plant said "you are not the man." Plant then asked where the prisoner was. Whitney replied "at Joseph Martell's." Robilliard and Blanchard remained outside near the door of the net-house. This was after dark. Plant did not explain to Whitney

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what he wanted of the prisoner. They then went to the door of the prisoner's house; Plant opened it. They wanted the prisoner; Plant asked where he was; his wife replied "I do not know; go and see on board the little vessel." Plant said, "we have been there, and he was not there; we must have him absolutely; we have got business with him." She replied, "What business have you? it is just as well to say it to me as to him: what do you want to do with him? Say it to me and I will tell him." They said "No, we must have him to-night: we do not wish to tell you; we will tell him:" and they then went away towards the point to hunt for him. When they came to the door there were about twenty persons behind the house.

Just after this occurrence the prisoner came home, stayed from five to ten minutes, went away, and slept all night at the house of a near neighbor, Joseph Martell. Between ten and eleven o'clock the same evening, Plant, Robilliard and the deceased, went to the house of Thomas Ward, after he had gone to bed, but for what purpose, was not shown.

On the next day, Friday, the prisoner was away from home most of the day, and Whitney saw him but once or twice. He came to the house of Joseph Martell on that day, between ten and eleven o'clock in the forenoon, to get his pistol, saying he wanted it for his hired man. He obtained it, carried it away, but it was not loaded and had no lock.

On the same day, about noon, Plant and the deceased were in company near the house of Peter Closs; the prisoner was also present, and then the deceased was standing about one hundred feet off. Plant was heard to make threats against the prisoner. Plant said to the prisoner, "It is a good while since you have had a grudge against me; I must whip you to satisfy myself." Plant went near to the prisoner and told him not to say anything; if he

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did he would give him slaps, or kicks. Plant then took a stone in his hand, and said, "Don't speak any more; I am a good Irishman, and will throw it at you." Pond did not say the least thing in reply to the threats, nor do anything; but went off quietly home. Immediately afterwards Plant went to the dock of Peter Closs, and there said, that he must whip Augustus Pond, or pass for the biggest loafer on the earth.

On the same day, about two o'clock in the afternoon, Plant and the prisoner were together at prisoner's premises, when the prisoner took Plant into the net-house, where they drank together once. They were there about ten minutes.

On Friday night, Plant did not go to bed. Plant, Robilliard and the deceased, were aboard some vessels near the shore from nine till about eleven o'clock in the evening, when they left the vessel. It was a bright moonlight night: the moon on this night was nearly full, and rose at ten o'clock and eleven minutes in the evening. Whitney and Cull went to bed in the prisoner's net-house, at about eleven o'clock in the evening. Before going to bed they set up the door in its usual place, and they soon went to sleep. None of the family in the prisoner's house went to bed this night, because they were afraid of Plant, Robilliard and the deceased.

Between one and two o'clock that night, Whitney was waked by boards being torn from the roof of the net-house, directly over his bed. Cull did not awake. Plant came inside and said, "some one is tearing down the net-house; let us go out and give 'em hell." At this time the west side and a part of the roof of the net-house were torn down by Robilliard and the deceased, who were outside, whilst Plant was inside the building. The whole three, Plant, Robilliard and the deceased, then went to the door of the prisoner's house, and as to what there transpired at the door, the prisoner's daughter, Mary Pond, testified as follows:

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"Plant shook the door and said, "Open the door;" mother answered "No, what will I open the door for?" Plant said "We want the master of the house." Mother asked, "Why do you want to see him?" Plant answered, "We have business with him." Mother said, "he is not here, and it is just as well to say it to me as to him." Father then got off the bed and got under it. Plant shook the door again and said, "open the door; we want to search the house." Mother replied, "I told you he is not here." Plant then asked for some crackers. I went and got them, whilst mother stood by the door, fastening it. She took the crackers and tried to give them through a crevice between the logs near the door. Blanchard did not want to take them through the crevice; he wanted the door opened, but finally took them through the crevice. Plant then again said, "Open the door." Mother refused. He then again said "open the door or you will regret it." Mother replied, "No I will not open it." Father was then going to come out from under the bed; mother said to him, "for God's sake do not come out, it will be your death-blow." Father came out but went under it again. Blanchard then asked for some sugar; I got it, gave it to mother, and she tried to give it to them through the crevice; they declined taking it through the crevice, and Plant said, "If you don't open the door you will regret it;" "open the door right away;" "open the door; it is Dave Plant, who speaks with you to-night; when Dave Plant tells you to open your door, you must open right away." She then slid the cord along, and opened the door from six to twelve inches, passed out the sugar; they did not take it, but Plant took hold of her arm and squeezed it; mother told him to let go; he answered, "no I will not, I want you to open the door." Mother fainted; she did not fall, but leaned on the door; they soon took the sugar and put it in their whisky. They then left, going towards the house of Louis Robinson. He lives in the

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same house with Thomas Ward. As they left they said, "Let us go towards Robinson's and see."

The prisoner then came out of his house, went to the house of Peter Closs, a near neighbor and brother-in-law, there obtained a double-barrelled shot gun, both barrels being already loaded with pigeon-shot. In about a quarter of an hour after he left his house, he returned with the gun, went into the net-house, looked around, and then went into his own house in company with Whitney. Whitney staid in the house a few minutes, then came out, did not go to bed again during the night, and went towards Thomas Ward's, where he heard the parties making a noise.

Plant, Robillard and the deceased, went to Robinson's house and asked for Thomas Ward. Ward and the family were in bed. They were told by Mrs. Robinson that he was not within. They insisted that he was. They were then told by Mrs. Robinson that she had a sick child. They said they didn't care a damn, they would come in any way, and if they couldn't come through the door, they would come through the roof. Mrs. Robinson then told them that Ward was in their net-house. They went to find him there, but not finding him, came back to the door, and said they would break the door open or come through the roof. Then Ward, who was in the house, spoke and told them to wait and he would go out. Ward got up, dressed himself, and went out. Plant asked Ward to go around with them. Ward refused. Plant asked Ward if he was afraid. Ward said he was afraid of going with them, they acted so mean. The deceased then put his hand on Ward's shoulder and told him not to be afraid, as they were not going to hurt him. The deceased then asked for something to eat. Ward went into the house to get something to eat, and whilst he was in for that purpose, the deceased stood by the door and told Ward not to be afraid, he wouldn't let any one in. Ward

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came out with some bread and butter, and gave it to all three, which they ate. While eating the bread and butter the deceased said, "We have torn down half the net-house of Augustus Pond, coming along, and have left the rest, so when we go back we will have the rest of the fun." He also said, "I want to see Gust. Pond: he abused an Irishman, and I want to abuse him just as bad as he abused the Irishman." He also said, "Pond has to be abused any way." He further said, "Thomas, this is good bread; I don't know but it may be the last piece of bread I'll eat." On this same occasion Plant said, "I must have a fight with Gust. Pond, and if I can't whip him, Isaac will whip him."

The deceased was then standing by the side of Ward, and had his hand on Ward's shoulder. Plant spoke of the three as being an army, and said that he was captain, Robilliard was Bonaparte, and Blanchard was the soldier, and was to do what they ordered. Plant said he had wanted Blanchard to go into prisoner's house, and he was going to punish him by drinking three times to his drinking once, for not doing as he was told to do. Plant and Robilliard drank twice by the door. Ward then went into his house, and Plant, Robilliard and the deceased, went away towards George Porkains' house.

They soon returned, and in passing Ward's house, they were heard to say that "they were going back again; were going to find him, and to whip him, or have the soul out of him." In passing, the deceased stopped by Ward's net-house. Plant and Robilliard went on towards the prisoner's house, and when they were two or three hundred feet from Ward's, as judged by the sound, Plant hallooed for Isaac Blanchard, thus: "Isaac, come along; are you afraid? What in hell is the use of being afraid? Follow me, you follow a man." Blanchard replied, "I am not afraid," and he then went in the direction of the prisoner's house.

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Plant, Robilliard and the deceased, then went to the door of the prisoner's house. They asked admission, which was refused by the prisoner's wife. She asked what they wanted. They replied that they wanted the master of the house, and that they wanted to come in and search the house. They were not admitted. The door was fastened with a cord.

The whole three then went to the prisoner's net-house. Robilliard and the deceased stood outside, and they commenced tearing down the net-house; at the same time Plant went inside, where Dennis Cull was sound asleep in bed. The first that Cull knew was his being pulled out of bed on to the floor. Plant was on top of him with his hand on his throat, choking him. Cull asked who it was choking him, but got no answer. Just at this time, whilst Plant was in the net-house and Robilliard and the deceased were tearing it down, the prisoner came to the door of his house, opened it, and hallooed thus: "Who is tearing down my net-house?" To this there was no response.

Near or about the same time, the voices of a woman and child were heard crying near the prisoner's house, and by the woman's voice the words "For God's sake" were spoken twice.

The boards were rattling at the same time that these voices of the woman and child were heard. The prisoner said, "Leave or I'll shoot," and after this the tearing down of the net-house continued. In about half a minute after the first order to leave, the prisoner said again, "Leave, or I'll shoot." These orders to leave were spoken with a loud voice.

A little before the firing of the gun, and whilst Plant was in the net-house, the cries of Cull were heard in the net-house. He hallooed as if he was in pain. He did not speak, but hallooed twice.

The boards stopped rattling about three or four seconds

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before the gun was fired, and the gun was fired from two to four seconds after the prisoner's second order of "Leave, or I'll shoot."

The gun was fired a little before daybreak, on the morning of Saturday, the 18th of June. It was proved clearly that the prisoner fired it. It was a double-barrelled shot gun, loaded with pigeon shot. Only one barrel was discharged.

The deceased was found dead the next morning a little after daylight, in a small path in the bushes about two hundred and twelve feet from the door of the prisoner's house, with wounds upon his person from pigeon shot, sufficient to cause death.

On the same morning after day-break, and before sunrise, the prisoner, at the house of Mr. Beaudoin, his father-in-law, and who lived near, met his brother Louis Pond, who was a constable and acting as such, and residing at Seul Choix. Prisoner said to his brother that he had come to give himself up to him, to take him for what he had done; and that he wanted to reach Beaver Islands, to give himself up to the law. The Beaver Islands are about twenty-five miles from Seul Choix. He addressed these words to his brother, "I come and surrender myself to you." His brother did not take him, because, as he said, the prisoner's men understood the matter better than he did, and at that time the brother did not think of his being a constable, as he was very much confused and excited from the occurrence. The prisoner then engaged his two hired men, Whitney and Cull, to go with him to Beaver Islands. On applying to Whitney for the purpose, he said to him that he should have to go to Beaver Islands to give himself up, and requested them, Whitney and Cull, to go with him and row the boat. Whitney and Cull started with him for Beaver Islands about sunrise, in a boat, and when within about seven miles of said Islands, they were overtaken by a boat from

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Seul Choix, containing Plant, Robillaird and three other persons, who took the prisoner into their boat, one of them being a constable, and brought him back to Seul Choix, and from there he was brought to the jail at Mackinac for confinement.

Wilson Newton was sworn as a witness for the prosecution, and he testified as to the different conversations and statements of the prisoner at different times concerning the homicide, after its occurrence. Upon his examination in chief, he testified that the prisoner said that Robilliard was on the roof of the net-house pulling the boards off; that Blanchard stood on the ground catching them, and he came out of his house and shot Blanchard, though he thought he had missed him, because he ran; that he couldn't tell how many there were together; that he fired into the pile, and as near as he could judge there were two or three; that Blanchard was on the run when he fired, and he fired with a shot gun that he got from a brother-in-law; that Blanchard stood with his side partly towards him, and that he couldn't tell how far it was to Blanchard from where he fired.

On the cross-examination, the witness testified, that the prisoner conversed with him fully and freely about the homicide. Prisoner told him the object of his going to Beaver Islands. He told the particulars of the homicide, as witness supposed, but witness was not sure that he (witness) recollected all. The prisoner explained to witness why he shot, and said: that Plant, Robilliard and the deceased, were prowling around his shanty; that they had been to his house more than once that night; that they wanted to come into his dwelling-house; that they tried to get in, and his wife held the door; that she kept the door fast and barred or held them out; that the first time they came they tore a part of the roof boards off; that he was under the bed when they were at the door, and he gave as a reason for going under the bed, that he was afraid of them;

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that there was a quarrel between him and Plant; that he was afraid they would flog him; that he had kept away from them from Thursday night till Saturday morning; that he had kept out of their sight as much as he could; that he had kept dodging them; that they threatened to tear down the roof of his dwelling, but was not positive whether prisoner said they threatened to do this the first or second time they came, on Friday night; and prisoner said he was afraid they would pull his heart out if they got hold of him, or his heart's blood, or something like that; and anyhow conveyed the idea that he was afraid of his life.

Some further evidence was given, and some questions arose as to the admissibility of evidence, but as these were not passed upon in this court, that portion of the bill of exceptions which presents them is omitted.

After counsel had summed up the cause, the court charged the jury generally in regard to the law of homicide as applied to this case, and farther instructed them as follows:

1. In regard to the ground of self-defense, the jury must be satisfied from the evidence, that it was rendered necessary from an attack then made upon the prisoner's person, by which his life was endangered, or he was in peril of great bodily injury, and such consequences could not otherwise be avoided; that in such cases it is the duty of the party to use other means, by retreating, or otherwise, if he can so avoid the apprehended consequence; that he can only resort to the taking of life by a deadly weapon, when the attack is being made so suddenly, and under such circumstances, that he could not by retreating or otherwise, avoid the apprehended injury; that the circumstances must appear from the evidence to have been such as to warrant this belief, and induce this conviction in the mind of the accused.

2. As to another ground of defense, the defense and protection of Dennis Cull, the prisoner's servant, the court charged in like manner, that the jury must be satisfied that

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there was a like necessity from a like assault upon his life or person; and that if the jury should find from the evidence, that the prisoner thus took the life of the deceased, either in self-defense or in defense and protection of Cull, that they should acquit the prisoner.

3. As to another ground of defense, the attack upon and destruction of the prisoner's building called the net-house, the court charged, that while the prisoner would have a right to use ordinary measures to protect his net-house from injury and destruction, and to use force for that purpose, yet he had no right for that purpose to resort to a deadly weapon, and to take the gun, shoot and kill the deceased; that the resort to and firing of the gun for this purpose was unlawful, and the homicide in respect to this alleged ground of defense, was without sufficient excuse or justification; that the attack upon his building, and the injury to it, were a legal trespass, for which he might seek and have redress in the courts, but that he had no right to repel the same by firing the gun and shooting the deceased.

To this third instruction the prisoner excepted.

The prisoner by his counsel then prayed the court to instruct the jury:

1 That if, from all the evidence and circumstances proved, the jury find the prisoner had reasonable ground to believe that there was a design to destroy his life, or commit any felony on his person, and that the deceased was either the principal in such design, or present as accessory, the killing of the deceased will be excusable homicide, although it afterwards appear that no felony was intended.

Which instruction the court refused to give as prayed, but did instruct the jury as so requested, with the following addition and qualification: "That it must also appear from the circumstances, that the taking the life of the deceased was necessary for the purpose of saving his own

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life, or protecting himself from such felony upon his person, and that the intent was then about being executed."

2. That if from all the evidence and circumstances proved, the jury find that the prisoner had reasonable grounds to believe that there was a design to destroy the life of the prisoner's servant, Dennis Cull, or commit any felony upon his person, and that the deceased was either the principal in such design, or present as accessory, the killing of the deceased will be excusable homicide.

Which instruction the court refused to give as prayed, except with the following qualification and addition: "That it must also appear that the intent was then being executed, and that the taking the life of the deceased was necessary for saving the life of the servant, or protecting him from such felony."

3. That if from all the evidence the jury find, that the homicide was committed in repelling the commission of a felony, or atrocious crime against the person of the prisoner, or of his servant, and if from all the evidence and all the circumstances as proved, the jury find that the prisoner used only the reasonable and necessary means to prevent it, the act of killing will be excusable homicide.

Which instruction the court refused to give as prayed, but did instruct the jury as requested, with the following addition and qualification; "If it could not otherwise be avoided."

4. That if from all the evidence, the jury find, that the homicide was committed in repelling the commission of a burglary or other felony upon the dwelling of the prisoner, and if from all the evidence and all the circumstances as proved, the jury find that the prisoner used only the reasonable and necessary means to prevent it, the act of killing will be justifiable homicide.

5. That if from all the evidence, the jury find that the net-house of the prisoner was an appurtenance, or outbuilding, of the prisoner's dwelling, and parcel of the mes-

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suage, and was regularly and ordinarily slept in at the time of the homicide by the prisoner's servants and members of his family, it was a dwelling within the meaning of the law; and if they further find, that the homicide was commited in repelling the commission of a burglary, or other felony on said building, by the deceased either as principal or accessory, and the prisoner used only the reasonable and necessary means to prevent it, the act of killing will be justifiable homicide.

6. That if from all the evidence, the jury find that the homicide was committed in repelling the commission of an atrocious crime against the prisoner's property, by the deceased as principal, or as aider and abettor, and that the prisoner used only the reasonable and necessary means to prevent it, the act of killing will be justifiable homicide.

7. That if from all the evidence, the jury find that the deceased was engaged at the time of the homicide as principal or accessory, in breaking and entering in the night time the prisoner's dwelling, with intent willfully and maliciously to destroy or injure the same, or to commit any other felony, and if they further find that the homicide was commited in repelling the same, and the prisoner used only the reasonable and necessary means to prevent it, the act of killing will be justifiable homicide.

8. That if from all the evidence, the jury find that the homicide was committed in repelling the willful and malicious destruction or injury of the prisoner's building, and the prisoner used only the reasonable and necessary means to prevent it, the act of killing will be justifiable homicde.

9. That a man's house is his castle, and that the making an attack upon a dwelling, and especially in the night, the law regards as equivalent to an assault upon a man's person; and if from all the evidence, the jury find that the homicide was comitted in repelling a willful, malicious and destructive attack upon the prisoner's dwelling, in such case the prisoner was not bound to retreat or abandon the dwelling

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to his adversary. And if the jury then find that the prisoner used only the reasonable and necessary means to prevent the attack, the killing will be justifiable homicide.

Which said instructions, numberd 4, 5, 6, 7, 8, and 9, the court refused to give, and the prisoner excepted.

10. That the prisoner had a right to judge and act upon the facts and circumstances which surrounded him, and as they appeared to him at the time of the homicide, and if from all the evidence, the jury find that the homicide was committed in repelling the *willful and malicious destruction of the prisoner's building*, and the prisoner used only the reasonable and necessary means to prevent it, the act of killing will be justifiable homicide.

Which said instruction the court refused to give as prayed, except with the following addition and qualification; "but he could not take life in so doing, or use a dangerous or deadly weapon for that purpose."

As to the fourth instruction above prayed, the court had in the general charge to the jury, instructed them that a man's dwelling-house is his castle; that if the deceased and those acting with him, had made an attack on the dwelling-house occupied by the prisoner with his wife and children, and attempted to break and enter it for any unlawful purpose, the prisoner would have the right to repel the same by force, and prevent its consummation, and in doing so, take life, if necessary for that purpose; and the court had already charged fully as above shown, in relation to the alleged injury to, and destruction of the net-house. Said fourth instruction was refused, because the court had already charged fully in respect to it; and further there was no evidence, nor was it insisted or claimed that there was any, tending to show such burglary or felony upon the dwelling-house occupied by the prisoner with his wife and children. But the prisoner's counsel claimed and insisted, that the net-house, under the evidence, was in law a dwelling-house of the prisoner, and that on that ground, and on the evidence, the jury should be instructed as in said fourth instruction above prayed.

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As to the seventh instruction above prayed, the court had already fully charged as above stated in reference to the fourth instruction, and there was no evidence, nor was it insisted or claimed that there was any, tending to show any such attack upon the prisoner's dwelling occupied by him with his wife and children; and so also as to the ninth instruction above prayed.

The subject of the 5th, 6th and 8th instructions above prayed, the court thought had already been covered by the general charge as above shown, in reference to the defense alleged, based on the attack upon and injury to the net-house.

The jury having found the prisoner guilty of manslaughter, the court sentenced him to confinement at hard labor in the State Prison for the period of ten years.

Buel & Trowbridge, for plaintiff in error:

The *main* questions arising in this case are:

1st. Whether the prisoner had a right to act upon the circumstances as they appeared to him, and whether he would be justified if he committed the homicide in the real and honest belief that he or his servant were in great danger of death or serious bodily harm, although it should afterwards turn out that he was mistaken, and there was in fact neither design to do harm or serious injury, nor danger that it would be done.

"When from the nature of the attack, there is *reasonable ground to believe* that there is a design to destroy his life, or commit any felony on his person, the killing of the assailant will be excusable homicide, *although it should afterwards appear that no felony was intended.*"—*Commonwealth v. Selfridge*, *Whart. Hom. app.* 417, 456.

The Supreme Court of this state has adopted the decision in Selfridge's case *in totidem verbis;* and commented on it as expressing the well established and recognized doctrine on this subject:—*People v. Doe*, 1 *Mich.* 457.

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The *intent* constitutes the essence of every crime; and therefore if a man kill another, really and honestly *believing* himself to be in great danger of death or serious bodily harm, it is neither murder nor manslaughter, but self defense; and he will be held excusable, although it should afterwards turn out that he was mistaken, and there was really no necessity for the extreme measure: — *Granger v. State*, 5 *Yerg.* 459.

This doctrine is fully sustained by the following authorities: — *Shorter v. People*, 2 *Comst.* 197, 202; *Mead's case*, 1 *Lewis C. C.* 184, *cited in Roscoe's Cr. Ev.* 771-2; *People v. Rector*, 19 *Wend.* 589; *U. S. v. Wiltberger*, 3 *Wash. C. C.* 515, 521; *Scully's case*, 1 *C. & P.* 319; *Commonwealth v. Riley*, *Thatch. C. C.* 475.

2d. Whether, under the evidence and circumstances as proved, the "net-house" was a dwelling of the prisoner.

Any house for the dwelling and habitation of man is a dwelling-house, wherein burglary may be committed: — 2 *East P. C.* 491; *Armour v. State*, 3 *Humph.* 387.

A dwelling-house need not be under one roof. It may be a cluster of separate buildings, and it includes the outhouses and all buildings in the cluster appurtenant and auxilliary, being parcel of the messuage, and within the curtilage, and which are subservient to the main dwelling for the purpose of habitation: — 1 *Bish. Cr. L.* §§ 165, 170, 171; 3 *Greenl. Ev.* § 80; *Whart. Cr. L.* §§ 1557, 1560, 1561; *Rex v. Walters*, 1 *Moody*, 13; *Rex v. Clayborn*, *Russ. & Ry.* 360; *State v. Langford*, 1 *Dev.* 253.

An enclosure or fence is not essential: — 1 *Bish. Cr. L.* § 171; 3 *Greenl. Ev.* § 80; *People v. Taylor*, 2 *Mich.* 250.

But if the net-house, as an out-building, was not legally part of the prisoner's main dwelling, *then it was a distinct dwelling of the prisoner if slept in by his servants*: — 1 *Bish. Cr. L.* § 166; *Rosc. Cr. Ev.* 348; *Whart. Cr. L.* § 1562; *Westwood's case*, *Russ. & Ry.* 495; *Stock's case*, 2 *Taunt.*

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339; *Russ. & Ry.* 185; *Smith's case*, 1 *Moody & Rob.* 256; *Armour v. State*, 3 *Humph.* 379.

3d. Whether the prisoner had a right to resort to the use of deadly weapons in repelling the wilful and malicious destruction of his building.

Blackstone says, that "such homicide as is committed for the *prevention* of any forcible and atrocious crime, is justifiable by the law of nature, and also by the law of England as it stood as early as the time of Bracton:" — 4 *Bl. Com.* 180.

A man may repel force by force in defense of his person, habitation or property, against any one who manifestly intends or endeavors by violence or surprise to commit a known felony on either, and if he kill him in so doing, it is justifiable homicide: — 1 *East P. C.* 271; *Foster*, 273; 2 *Bish. Cr. L.* §§ 553, 569; *Gray v. Combs*, 7 *J. J. Marsh.* 482; *U. S. v. Travers*, (*Justice Story's opinion*), 2 *Whart. Cr. C.* 497; *Hinchliff's case*, 1 *Lewin Cr. C.* 168. See also the law of riots and riotous homicide: — *Whart. Hom.* 352; *Whart. Cr. L.* § 1024. It must logically follow from this rule, that a man may use whatever force may be necessary to make his defense effectual; otherwise the rule is a nullity, and means nothing.

The court instructed the jury "that the attack upon the prisoner's building, and the injury to it, were a legal trespass, for which he might seek redress in the courts." This proposition is technically correct, as it would be in any case of burglary, arson, or any other criminal assault upon property. But taken in connection with the *context* of the charge, and as a naked proposition, it being so delivered without explanation of its *whole* bearing and application, and without the *slightest* notice of distinction between the right to repel a mere *legal* and *civil trespass* on property, and the right to repel its *felonious* and *criminal destruction* or *injury*, the proposition was well calculated to confound and mislead the jury, and lead

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them to suppose that the prisoner had no remedy against the crime by using reasonable and necessary means to prevent it, and that he had no other remedy than to *submit* to the crime, if he could not *peaceably* prevent it, and then "seek redress in the courts" by civil suit for the value of the property destroyed. It is submitted that such is not the spirit nor the letter of our enlightened system of jurisprudence.

There is a clear distinction noticed by all the authorities between the right of defense against a felonious or criminal attack upon property, and of defense against a mere trespass, which the court in this case entirely overlooked.

A mere legal trespass is a private wrong, and no crime. A crime is a public wrong, and, according to its nature, may or may not be a legal trespass or private wrong. For the private wrong or trespass, in either case, the law awards to the injured party his damages or compensation. But for the crime or public wrong, the law awards no compensation, but punishment.

There is, therefore, ample reason why a mere legal trespass or private wrong should not be resisted unto death. It has its ample remedy.

Not so with a crime or public wrong, for which, when once committed, there is no remedy, though it may be punished. The law of society, the public safety, therefore, requires that crime be resisted and prevented; and hence every citizen is invested not only with the right but duty to repel and prevent it; but the means employed must appear to be necessary and reasonable for the purpose, in view of the nature of the crime and all the circumstances of the case.

All crime, therefore, can and should be resisted; but whether the degree of force used be necessary, and whether resistance unto death be justifiable in any particular case, are not matters of law for the court, but fact for the jury,

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to be submitted to them under the law and the evidence, which in the present case the court refused to do:—*State v. Clement*, 32 *Me.* 279; *U. S. v. Wiltberger*, 3 *Wash. C. C.* 521; and the authorities generally.

J. M. Howard, Attorney General, for the People:

Under our statute, the destruction of the net-house was undoubtedly a felony, but not such a felony as the law requires to justify the slaying of the offender in order to prevent it. While a man may use all reasonable and necessary force to defend his real or personal estate, of which he is the actual possessor, against another who comes to dispossess him without right, he can never innocently carry his defense to the extent of killing the aggressor:—2 *Bish. Cr. L.* § 558; 1 *Ibid.* §§ 549, 559, 622; 4 *Mass.* 391; 1 *C. & Marsh.* 209; 32 *Me.* 279; 1 *Mich.* 456. The attack upon the net-house, though technically a felony, was in its nature a mere trespass, and it is believed that no adjudicated case can be found where the act of committing a mere trespass has been held to justify and excuse a homicide.

The net-house was not the prisoner's dwelling-house. To make such an out house a subject of burglary, the dwelling-house proper and the out house must be enclosed by a common fence:—3 *Greenl. Ev.* §§ 79, 80; 4 *Bl. Com.* 224; 1 *Russ. & Ry.* 187. Though a man may occupy two dwelling-houses, yet the structure must possess such qualities as indicate that it is intended as a residence and habitation:—1 *Bish. Cr. L.* § 166. Sleeping in it is not alone sufficient:—2 *East P. C.* 499.

The mere assault and battery upon Cull, unaccompanied by imminent danger to the life of the assailed, will not justify killing the assailant:—2 *Bish.* §§ 544, 550, 281; and see 11 *Mod.* 242; *McLeod's case*, 1 *Hill*, 377, 419, 420; *Webster's Works, Vol.* 6 *p.* 261.

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POND V. THE PEOPLE.

CAMPBELL J.:

The defense of this case, as presented in the court below, was based upon a claim that the accused was only chargeable with excusable or justifiable homicide. And as most of the questions raised before us involve the consideration of the same subject, it may be necessary to examine somewhat carefully into the rules which divide homicide into its various heads, and determine the character of each act of slaying.

The facts are claimed, by the counsel for the accused, to have a tendency to establish the act as innocent on various grounds: *first*, as excusable in defence of himself or his servant; *second*, as justifiable in repelling a riotous attack, and *third*, as justifiable in resisting a felony.

The first inquiry necessary, is one which applies equally to all of the grounds of defense; and is whether the necessity of taking life, in order to excuse or justify the slayer, must be one arising out of actual and imminent danger; or whether he may act upon a belief, arising from appearances which give him reasonable cause for it, that the danger is actual and imminent, although he may turn out to be mistaken.

Human life is not to be lightly disregarded, and the law will not permit it to be destroyed unless upon urgent occasion. But the rules which make it excusable or justifiable to destroy it under some circumstances, are really meant to ensure its general protection. They are designed to prevent reckless and wicked men from assailing peaceable members of society, by exposing them to the danger of fatal resistance at the hands of those whom they wantonly attack, and put in peril or fear of great injury or death. And such rules, in order to be of any value, must be in some reasonable degree accommodated to human character and necessity. They should not be allowed to entrap or mislead those whose misfortunes compel a resort to them.

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Were a man charged with crime to be held to a knowledge of all facts precisely as they are, there could be few cases in which the most innocent intention or honest zeal could justify or excuse homicide. The jury, by a careful sifting of witnesses on both sides, in cool blood, and aided by the comments of court and counsel, may arrive at a tolerably just conclusion on the circumstances of an assault. But the prisoner, who is to justify himself, can hardly be expected to be entirely cool in a deadly affray, or in all cases to have great courage or large intellect; and can not well see the true meaning of all that occurs at the time; while he can know nothing whatever concerning what has occurred elsewhere, or concerning the designs of his assailants, any more than can be inferred from appearances. And the law, while it will not generally excuse mistakes of law (because every man is bound to know that), does not hold men responsible for a knowledge of facts unless their ignorance arises from fault or negligence.

A criminal intent is a necessary ingredient of every crime. And therefore it is well remarked by Baron Parke in *Regina v. Thurborn*, 2 *C. & K.* 832, that "as the rule of law, founded on justice and reason, is that *actus non facit reum nisi mens sit rea*, the guilt of the accused must depend on the circumstances as they appear to him." And Mr. Bishop has expressed the same rule very clearly, by declaring that "in all cases where a party, without fault or carelessness, is misled concerning facts, and acts as he would be justified in doing if the facts were what he believed them to be, he is legally as he is morally innocent: — 1 *Bish. Cr. L.* § 242.

These principles have always been recognized, and are sustained by numerous authorities; but they need no vindication, and a further citation would add nothing to the clear and intelligible statements already referred to. And from an examination of some of the charges given, we

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are very much inclined to believe that the court below entertained the same views, at least as to some branches of the defense. But as some of the charges actually given, and particularly those in response to the first and second instructions requested, negative this rule, and the jury upon those must have been misled, we must regard these charges as erroneous unless they were inapplicable to the case altogether. Their applicability will be presently considered.

In order to determine the materiality of the questions of law raised, it becomes necessary to determine under what circumstances homicide is excusable or justifiable. In doing this, it will be proper to advert merely to those instances which may be regarded as coming nearest to the circumstances of the case before us. The other cases we are not called upon to define or consider; and what we say is to be interpreted by the case before us.

The only variety of excusable homicide (as contra-distinguished from justifiable homicide at common law) which we need advert to, is that which is technically termed homicide *se aut sua defendendo*, and which embraces the defense of one's own life, or that of his family, relatives or dependants, within those relations where the law permits the defense of others as of one's self. Practically, so far as punishment is concerned, there is no distinction with us between excusable and justifiable homicide; but a resort to common law distinctions will nevertheless be convenient, in order to illustrate the difference between the various instances of homicide in repelling assaults, according as they are or are not felonious. Homicide *se defendendo* was excusable at common law when it occurred in a sudden affray, or in repelling an attack not made with a felonious design. According to Mr. Hawkins, it was excusable and not justifiable because, occurring in a quarrel, it generally assumed some fault on both sides: — *Hawk. P. C., B.* 1 *Ch.* 28, § 24. In these cases, the original assault not being with a feloni-

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ous intent, and the danger arising in the heat of blood on one or both sides, the homicide is not excused unless the slayer does all which is reasonably in his power to avoid the necessity of extreme resistance, by retreating where retreat is safe, or by any other expedient which is attainable. He is bound, if possible, to get out of his adversary's way, and has no right to stand up and resist if he can safely retreat or escape:—See 2 *Bish. Cr. L.* §§ 543 to 552, 560 to 562, 564 to 568; *People v. Sullivan*, 3 *Seld.* 396; 1 *Russ. Cr.* 660 *et seq.* Mr Russell lays down the rule very concisely as follows (*p.* 661): "The party assaulted must therefore flee, as far as he conveniently can, either by reason of some wall, ditch, or other impediment, or as far as the fierceness of the assault will permit him; for it may be so fierce as not to allow him to yield a step without manifest danger of his life or great bodily harm; and then, in his defense, he may kill his assailant instantly. Before a person can avail himself of the defense that he used a weapon in defense of his life, he must satisfy the jury that that defense was necessary; that he did all he could to avoid it; and that it was necessary to protect his own life, or to protect himself from such serious bodily harm as would give him a reasonable apprehension that his life was in immediate danger. If he used the weapon having no other means of resistance, and no means of escape, in such case, if he retreated as far as he could, he would be justified." A man may defend his family, his servants or his master, whenever he may defend himself. How much further this mutual right exists, it is unnecessary in this case to consider:—See 2 *Bish. Cr. L.* §581, *and cases cited;* 1 *Russ. Cr.* 662; 4 *Bl. Com.* 184.

There are many curious and nice questions concerning the extent of the right of self defence, where the assailed party is in fault. But as neither Pond nor Cull were in any way to blame in bringing about the events of Friday night, which led to the shooting of Blanchard, it is not

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important to examine them. The danger to be resisted must be to life, or of serious bodily harm of a permanent character; and it must be unavoidable by other means. Of course we refer to means within the power of the slayer, so far as he is able to judge from the circumstances as they appear to him at the time.

A man is not, however, obliged to retreat if assaulted in his dwelling, but may use such means as are absolutely necessary to repel the assailant from his house, or to prevent his forcible entry, even to the taking of life. But here, as in the other cases, he must not take life if he can otherwise arrest or repel the assailant: — 2 *Bish. Cr. L.* § 569; 3 *Greenl. Ev.* § 117; *Hawk. P. C., B.* 1 *Ch.* 28, § 23. Where the assault or breaking is felonious, the homicide becomes justifiable, and not merely excusable.

The essential difference between excusable and justifiable homicide rests not merely in the fact that at common law the one was felonious, although pardoned of course, while the other was innocent. Those only were justifiable homicides where the slayer was regarded as promoting justice, and performing a public duty; and the question of personal danger did not necessarily arise, although it does generally.

It is held to be the duty of every one who sees a felony attempted by violence, to prevent it if possible; and in the performance of this duty, which is an active one, there is a legal right to use all necessary means to make the resistance effectual. Where a felonious act is not of a violent or forcible character, as in picking pockets, and crimes partaking of fraud rather than force, there is no necessity, and therefore no justification, for homicide, unless possibly in some exceptional cases. The rule extends only to cases of felony; and in those it is lawful to resist force by force. If any forcible attempt is made, with a felonious intent against person or property, the person resisting is not obliged to retreat, but may pursue

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his adversary, if necessary, till he finds himself out of danger. Life may not properly be taken under this rule where the evil may be prevented by other means within the power of the person who interferes against the felon. Reasonable apprehension, however, is sufficient here, precisely as in all other cases.

It has also been laid down by the authorities, that private persons may forcibly interfere to suppress a riot or resist rioters, although a riot is not necessarily a felony in itself. This is owing to the nature of the offense, which requires the combination of three or more persons, assembling together and actually accomplishing some object calculated to terrify others. Private persons who can not otherwise suppress them, or defend themselves from them, may justify homicide in killing them, as it is their right and duty to aid in preserving the peace. And perhaps no case can arise where a felonious attempt by a single individual will be as likely to inspire terror as the turbulent acts of rioters. And a very limited knowledge of human nature is sufficient to inform us, that when men combine to do an injury to the person or property of others, of such a nature as to involve excitement and provoke resistance, they are not likely to stop at half way measures, or to scan closely the dividing line between felonies and misdemeanors. But when the act they meditate is in itself felonious, and of a violent character, it is manifest that strong measures will generally be required for their effectual suppression; and a man who defends himself, his family or his property, under such circumstances, is justified in making as complete a defense as is necessary.

When we look at the facts of this case, we find very strong circumstances to bring the act of Pond within each of the defenses we have referred to. Without stopping to recapitulate the testimony in full or in detail, we have these leading features presented: Without any cause or provocation given by Pond, we find Plant, Robilliard and

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Blanchard, combining with an expressed intention to do him personal violence. On Thursday evening this gang, with from fifteen to twenty associates, having been hunting for Pond, found him at a neighbors, and having got him out of doors, surrounded him, while Plant struck him with his fist, and kicked him in the breast, with insulting language, evidently designed to draw him into a fight. He escaped from them, and ran away into the woods, and succeeded in avoiding them that night. That same night they tore down the door of the net-house, where his servants were asleep, in search of him; and not finding him there, went to the house; the whole rabble being with them; and wanted Pond, and expressed themselves determined to have him; but refused to tell his wife what they wanted of him. Not finding him there, they started off elsewhere in search of him. This was between nine and ten o'clock at night. About noon of Friday, Plant and Blanchard met Pond, when Plant threatened again to whip him; and then went up to him, told him not to say anything, and that if he did he would give him slaps or kicks. Plant then took a stone in his hand, and threatened if Pond spoke, to throw it at him. Pond said nothing, but went home quietly, and Plant went off and was heard making further threats soon after. Friday night neither Pond nor his family went to bed, being in fear of violence. Between one and two o'clock that night, Plant, Robilliard and Blanchard went to the net-house, and partially tore it down, while Whitney and Cull were in it. They then went to the house where Pond, his wife and children were, shook the door, and said they wanted Pond. Pond concealed himself under the bed, and his wife demanded what they wanted of him, saying he was not there; when Plant shook the door again, and ordered Mrs. Pond to open it; saying they wanted to search the house. She refusing, they resorted to artifice, asking for various articles of food, and objecting to receiving them except through the door. Plant then repeatedly

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commanded her to open the door, saying if she did not, she would regret it. On opening the door from six to twelve inches, by sliding the cord, to hand them some sugar, which they demanded, they did not take the sugar, but Plant seized Mrs. Pond's arm, and squeezed it until she fainted. Not succeeding in getting into the house, they then left for Ward's, and Pond went to the house of his brother-in-law, and borrowed a double barreled shot gun loaded with pigeon shot, and returned home. While at Ward's, Blanchard told the latter that they had torn down part of Pond's net-house, and had left the rest so that when they went back they would have the rest of the fun. Blanchard also said, "I want to see Gust. Pond: he abused an Irishman, and I want to abuse him just as bad as he abused the Irishman. Pond has to be abused any way." He also said to Ward, "this is good bread, I don't know but it may be the last piece of bread I'll eat." Plant also made threats. A short time after returning, they were heard to say they were going back again; were going to find him and to whip him, or have the soul out of him. It is to be remarked that we have their language as rendered by an interpreter, who was evidently illiterate, or at least incompetent to translate into very good English; and it is impossible for us to determine the exact force of what was said.

The party then went back to Pond's, and asked admittance to search for him. His wife refused to let them in. They immediately went to the net-house, where Cull was asleep. Plant seized Cull, and pulled him out of bed on the floor, and began choking him. Cull demanded who it was, but received no answer. Blanchard and Robilliard had commenced tearing down the boards. Pond went to the door and hallooed, "Who is tearing down my net-house?" to which there was no answer. The voices of a woman and child were heard crying, and the woman's voice was heard twice to cry out "for God's sake!" Cull's voice was also heard from the net-house, not speaking, but

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hallooing as if he was in pain. Pond cried out loudly "leave or I'll shoot." The noise continuing, he gave the same warning again, and in a few seconds shot off one barrel of the gun. Blanchard was found dead the next morning. Pond took immediate steps to surrender himself to justice.

A question was raised whether the net-house was a dwelling or a part of the dwelling of Pond. We think it was. It was near the other building, and was used not only for preserving the nets which were used in the ordinary occupation of Pond, as a fisherman, but also as a permanent dormitory for his servants. It was held in *The People v. Taylor*, 2 *Mich.* 250, that a fence was not necessary to include buildings within the curtilage, if within a space no larger than that usually occupied for the purposes of the dwelling and customary out-buildings. It is a very common thing in the newer parts of the country, where, from the nature of the materials used, a large building is not readily made, to have two or more small buildings, with one or two rooms in each, instead of a large building divided into apartments.

We can not, upon a consideration of the facts manifest from the bill of exceptions, regard the charges asked by the defense as abstract or inapplicable to the case. It was for the jury to consider the whole chain of proof; but if they believed the evidence as spread out upon the case, we feel constrained to say that there are very few of the precedents which have shown stronger grounds of justification than those which are found here. Instead of reckless ferocity, the facts display a very commendable moderation.

Apart from its character as a dwelling, which was denied by the court below, the attack upon the net-house for the purpose of destroying it, was a violent and forcible felony. And the fact that it is a statutory and not common law felony, does not, in our view, change its character. Rape and many other of the most atrocious felonious assaults, are statutory felonies only, and yet no

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one ever doubted the right to resist them unto death. And a breaking into a house with the design of stealing the most trifling article, being common law burglary, was likewise allowed to be resisted in like manner, if necessary. We think there is no reason for making any distinctions between common law and statute felonies in this respect, if they are forcible and violent. So far as the manifest danger to Pond himself, and to Cull, is concerned, the justification would fall within the common law.

It is claimed by the prisoner's counsel, that we are authorized to pronounce upon the case the judgment which the facts warrant. Had the facts spread out in the bill of exceptions been found as a special verdict by the jury, this would be true. But as the case stands, we can only consider them as bearing upon the instructions given or refused. The errors being in the rulings, and not in the record outside of the bill of exceptions, we can do nothing more, in reversing the judgment, than to order a new trial. The District Judge has ruled upon the law questions in such a way as to present them all fairly as questions not before decided in this state. We think there was error in requiring the actual instead of apparent and reasonably founded causes of apprehension of injury; in holding that the protection of the net-house could not be made by using a dangerous weapon; and that the conduct of the assailing party was not felonious; and also in using language calculated to mislead the jury upon the means and extent of resistance justifiable in resisting a felony.

We do not deem it necessary to pass upon the minor points, as we do not suppose the authorities will deem it important to proceed further, unless the facts are very different from those presented.

The judgment below must be reversed and a new trial granted.

MANNING and CHRISTIANCY JJ., concurred.

MARTIN CH. J., concurred in the result.

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Jonas H. Titus v. The Minnesota Mining Company.

Complainant, as president and agent of the Baltimore Mining Company, made a written agreement to sell to H. and his associates the location of the Baltimore Co.; they to pay therefor $4,500, and to deliver to him "proper certificates of one-fifth the entire interest in said location, and in the capital stock of a company to be formed for mining thereon to be forever unassessable, and to be delivered to the shareholders" of the Baltimore Company. To this was attached an undertaking on the part of H. and his associates to take stock in the proposed new company, according to the tenor of this agreement. The $4,500 was paid, and complainant transferred the location to H. who gave back an undertaking, that on the formation of the proposed new company, on such location, one-fifth of its stock should be issued to the president of the Baltimore Company, "*to be endorsed by him and delivered to the shareholders*" of that company. A new company, the Vulcan, was formed as contemplated by this arrangement, to which H. conveyed the Baltimore location; and the association, in their articles, state their object to be the prosecution of mining operations, on the location obtained from the Baltimore Company, "*or on any other lands that may be leased, located or bought by the association for mining purposes.*" The stock for the shareholders of the Baltimore Company was not delivered. Complainant afterwards, in his own name, but claiming to be trustee of such shareholders, filed a bill in Chancery, alleging that the Vulcan Company had purchased another location in the name of H., and in order to defraud him and the shareholders of the Baltimore Company of their rights under the agreement, the shareholders of the Vulcan had formed a new Company—the Minnesota, since incorporated—to which H. had conveyed such new location; that the Vulcan Company was now to all practical purposes dissolved and dead, and the Minnesota fraudulently and collusively substituted in its place, and the latter is now in fact and in truth the Vulcan—and praying that it might be decreed to deliver to complainant, as president of the Baltimore Company, for the use thereof, one-fifth of its stock; and for an account.

It seems that the contract on the part of H. and his associates, was not with complainant as *trustee* of the Baltimore Company, but with the *company* acting through him as its agent; and that the company was a necessary party complainant to the bill.

It seems, also, that the supplementary agreement given by H. to complainant is of no binding force, there being no proof that the associates of H. authorised any modification of the first agreement, and the authority of the Baltimore Company to complainant, to make sale of their location, not conferring upon him power to make partition or distribution of the proceeds of the sale.

The Vulcan Company being still in existence, and the owner of the location purchased of the Baltimore, it is not and can not be identical with the Minnesota, and it should be defendant in the suit.

The insertion in the articles of the Vulcan Company of a clause looking to the prosecution of mining operations on other lands than those purchased of the Baltimore, could not enlarge the rights of the Baltimore Company under the agreement, nor place the Vulcan under obligation to purchase other lands for such operations. It was without consideration from the Baltimore, and that company was not a party to it. The Vulcan Company might strike out that clause without giving the Baltimore any right to complain.

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TITUS v. THE MINNESOTA MINING CO.

There was no fraud upon the Baltimore Company, or upon complainant, in the members of the Vulcan Company purchasing a new location, and forming a new company to work it, to the exclusion of complainant.

Nor does proof showing that H. bought the location now occupied by the Minnesota, stating at the time that he bought it for the Vulcan Company, and that the agent of that Company, without its authority, worked for a time upon it, representing it to have been bought by that company, and that the Vulcan Company declined to take it, and its members formed a new company with the express design of excluding the Baltimore Company from the benefits its shareholders would have derived from its being purchased by the Vulcan, make out any case of fraud upon the Baltimore Company, since it does not deprive it or its shareholders of any right intended to be given, or which it or they had a right to demand, under the original agreement.

Heard November 15th, 16th, 17th and 18th, 1859. Decided May 23d.

Appeal by complainant from the Wayne Circuit in chancery.

The testimony in the case was voluminous, filling a large volume, and except where it consisted of written documents, to a considerable extent contradictory. No attempt will be made to give here even an abstract of it, or a statement of its general result; and reference must be had to the opinions for the impressions left by it on the minds of the several judges. The following, however, which is in some measure copied from the clear and succinct statement of facts embraced in the opinion of Hon. SANFORD M. GREEN, the Circuit Judge who decided the case in the court below, is believed to embrace such leading facts as are necessary to be stated in order to an understanding of the legal questions.

Some time in the year 1845, the Baltimore Mining Company, consisting of the complainant and ten others, was organized for the purpose of mining copper and other ores in the Upper Peninsula of Michigan, as a joint stock company. Its capital stock was divided into 3,000 shares. Upon the first organization of the company, the complainant was elected its president, which office he has ever since continued to hold.

In 1846, that company held leases issued by the War Department of the United States, numbered 267 and 269, covering each one square mile, in the mineral district of the Upper Peninsula.

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On or about the 21st day of November, 1846, the complainant, as president and agent of the said company, duly authorized for that purpose, sold and transferred the said two leases to William Hickok, or to William Hickok & Co., of the city of New York, as the basis upon which a new company was to be formed for mining purposes.

The agreement for such sale on the part of the complainant was in the following words:

"Memorandum of an agreement by and between Jonas H. Titus, of the city of Detroit, as president of the Baltimore Mining Company, and Hickok & Co., of the city of New York, viz:

"First: Jonas H. Titus, as president and duly authorized agent of the Baltimore Mining Company, agrees to sell to Hickok & Co. and their associates, the two western locations of said Baltimore Company, held by leases 267 and 269 from the War Department, and fully described therein.

"Second: Hickok & Co. and their associates agree to pay the sum of four thousand five hundred dollars on the proper assignment and transfer to them and their associates, or to the trustees of a company formed by them, of the leases 267 and 269 above referred to.

"Third: Also to deliver to said Jonas H. Titus proper certificates of one-fifth of the entire interest in and to said locations, and the capital stock of a company formed for mining thereon, to be forever unassessable, and to be delivered to the shareholders of the Baltimore Mining Company.

"Fourth: A company for mining purposes shall be formed in the city of New York on the basis of these locations, of which the capital stock shall be divided into shares as hereafter named, each subscriber paying an assessment of one and fifty-one hundredths dollars per share, at the time of each subscription, for the aforesaid sum of purchase.

"Fifth: When all the stock shall have been taken up, there shall be a meeting of the subscribers, at which each

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share shall be entitled to one vote; and articles of association shall be prepared and signed by all the subscribers of stock, embracing the following subjects among its fundamental provisions, to wit:

"(A) There shall be four thousand shares, of which one thousand shall be forever unassessable, and eight hundred of these shall belong to the shareholders of the Baltimore Mining Company, and two hundred to the new company; the remaining three thousand to be subscribed for, and the assessment paid as aforesaid.

"(B.) There shall be one president, one treasurer, and three trustees, who, together, shall constitute a board of directors, who may appoint their secretary, and manage the affairs of the company.

"J. H. TITUS,

"President and agent of the Baltimore Mining Co.

"New York, Nov. 21st, 1846."

To this agreement was attached the following:

"We, whose names are hereunto signed, do hereby subscribe for the number of shares affixed to our several names, on the consideration and according to the full tenor and meaning of the foregoing agreement.

Nov. 21st.

Names.	Residence.	Shares.
HICKOK & Co.	New York.	1600
WM. PEARSALL, Jr.	"	300
DANIEL A. GALLOWAY,	"	300
J. T. GILBERT,	"	100
HORATIO N. DAVIS,	"	100
SMITH & LAMBERT,	"	200
C. EDGAR SMITH,	"	100
J. H. TITUS,	Detroit.	100
JACOB H. STOEVER,	New York.	100
E. BIRDSALL,	"	100
		3000
Unassessable,		1000
	Shares,	4000"

Titus, in pursuance of the arrangement contemplated by

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his agreement, assigned and transferred the leases to Wm. Hickok, and the latter executed the following instrument, which was delivered to the complainant:

"As a part of the consideration for the sale and transfer of leases 267 and 269 of mineral lands, by the Baltimore Mining Company to William Hickok, I do hereby agree and promise that, on the formation of a mining company on said leased lands, 800 shares of unassessable stock shall be issued to the president of the Baltimore Mining Company, to be endorsed by him, and distributed among the shareholders of the Baltimore Mining Company *pro rata* to their number of shares; said unassessable shares to be numbered from one to eight hundred, both inclusive; said new company to be organized and the stock issued within sixty days from date.

New York, Nov. 23d, 1846, Monday evening, 10 o'cl'k.

WM. HICKOK, assignee of leases."

The $4,500 was paid to complainant, and, as contemplated, a new company was formed by Hickok and his associates (including all who signed the undertaking attached to the Titus agreement except Titus and Stoever) by articles of association bearing date November 30, 1846, under the name of "Vulcan Mining Company." The stock was by these articles divided into 4000 shares, 1000 to be unassessable, 200 of which should be the property of the company when sold, and 800 to "be allotted and transferred to the Baltimore Mining Company." And they declare their purposes to be the prosecution of mining operations on the tracts or parcels of land so purchased, or on any other lands in said mineral district that might be leased, located, or bought by the association for mining purposes.

Wm. Hickok was the treasurer and one of the largest shareholders of the Vulcan Company, and from its first organization appears to have been the most active and influential of its directors.

In the spring of 1847, Samuel O. Knapp was appointed

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local agent of the Vulcan Company, and with a small number of men went upon these locations, and made explorations and examinations for mineral until the autumn of that year, without success; the entire amount found during the season being only a few pounds.

From such examination, and a more intimate acquaintance with their geological formation, Knapp became satisfied that there was no prospect of finding upon either of these tracts copper or other mineral in sufficient quantity to warrant any further outlay of money in seeking it there. His examinations below the surface, in various places, revealed the fact that these locations were not underlaid with the copper-bearing trap rock, but with a species of sand stone, in connection with which that mineral is not likely to be found in abundance.

While engaged here, in July, 1847, Knapp received from Hickok instructions to go and make an examination of the Algonquin Mine, which was some sixteen or eighteen miles distant from the Vulcan locations. He went there and made his examination, and on his way back followed the trap range which led him across the Ontonagon location, numbered 98. He saw where the Ontonagon Co. had been at work, and paid considerable attention to the character of the rock and the vein stone there, and became satisfied the location was a valuable one for mining purposes.

George C. Bates was a director and acting agent for the Ontonagon Co. in the city of Detroit. In September, 1847, Knapp started from the mining region for New York, and on his way, called at Detroit on Mr. Bates, and learned from him that the whole or part of location 98 was offered to be sold, and that negotiations were pending with a third party for the transfer of it, and that, if such negotiations should fail, it might be purchased by other parties. On his arrival in New York in the latter part of September, he had an interview with Hickok, and informed him of his poor success in mining, &c., and on the 20th of that

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month a special meeting of the Vulcan Company was held, which Knapp attended. At that meeting he exhibited to the stockholders what copper he had found, as the result of his operations for that season, and gave an account of the discouraging prospects of their adventure in mining. He also informed them of his examinations and inquiries in regard to location 98, and expressed to them his confident belief that it was a valuable one, and advised them to purchase it if practicable.

At that meeting, after a discussion of their affairs, it was resolved,

First: That the company should continue their mining operations during the ensuing winter, under the direction and superintendence of Mr. Knapp.

Second: That Mr. Knapp be requested to furnish the trustees forthwith an estimate of the probable expense of prosecuting the said operations until the first of June then next; and

Third: That Mr. Knapp be instructed to make inquiries at Detroit and elsewhere, on his return, as to the possibility of purchasing the whole or a portion of the Ontonagon Company's location, and to communicate to the company as soon as possible such information as he might be able to obtain upon the subject.

With respect to the proceedings and discussions of the members at this meeting, and the authority intended to be conferred upon Knapp as to the purchase of the Ontonagon location, the testimony of the members was contradictory; Galloway's testimony going to show that Knapp was expected to make the purchase, and Hickok, Barry, and others, testifying that decided opposition was expressed to the purchase being made, for several reasons; and among others, because complainant and the Baltimore Co. were to be benefited by it. Barry says:

"Mr. Hickok was in favor of an immediate purchase, if possible, and advocated giving full power to Mr. Knapp

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to make the same at once on behalf of the Company. This proposition was strongly opposed by several of the other members present, particularly Pearsall, C. E. Smith, and myself; one of the grounds of our opposition was, that if the Vulcan Co. made such purchase, the Baltimore Co. would have an interest therein, without contributing a cent of the purchase-money, or being liable to assessment for carrying on mining operations; that we had already been subjected to great loss by investment in the Vulcan Co. on the misrepresentations of Titus, and were under no obligations to purchase another location and spend more money for his benefit. For myself, I was opposed to it for the additional reason, that I could not afford to lose more money, and was afraid to risk any further investment in an enterprise which appeared to be so very uncertain in its results. Mr. Hickok evinced considerable feeling because his views were not favored by the meeting, and, in order to conciliate him, I suggested that time should be allowed to think and talk the matter over; that I had no objections that Mr. Knapp, on his return to Detroit, might be instructed to make inquiries, and ascertain whether the purchase of No. 98, or a part of it, could be made, and report to the company, by which time we should probably be better prepared to act definitely on the subject: I, therefore, by way of compromise, offered a resolution to that effect, which, after some opposition and much discussion, was finally adopted unanimously by the meeting. This was the only authority ever given to Mr. Knapp by the Vulcan Co., to the best of my knowledge and belief, touching the question."

The following letter was put in evidence by complainant, and refers to the contemplated purchase:

"NEW YORK, Sept. 21, 1847.

"FRIEND TITUS,

Dear Sir: — Your favor by our friend Mr. Knapp was handed us in due time. We were much pleased with

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your assistance to Mr. Knapp in negotiating draft. We take the liberty of asking a similar favor again. We have some $800 to raise for Mr. K. to proceed with his work this coming winter.

So far, Mr. K. has not been able to strike a vein, but we have not lost our confidence in that or the Baltimore location; and if Mr. K. should suspend operations temporarily on the Vulcan locations, it will be because he thinks veins already exposed can be purchased at less expense than he can find one on our location.

Mr. K. has a kind of a *carte blanche*, to operate as he deems will best serve the interests of the stockholders.

In regard to the location spoken of, we have left the matter with Mr. Knapp, if possible, to make his negotiations in Detroit. We should like very much to see the Baltimore and the Vulcan Co. on them hard at work.

If it can be purchased, we shall see that there is a smelting furnace put up there next summer.

We have, and so have the Vulcan Co., the fullest confidence in Mr. Knapp's operations; and if he can strike a rich vein, he will put the company inferior to none on the mineral region.

We shall prohably write you early as day after to-morrow. We have some further favors to ask of you — to see if you can purchase certain stocks in your market, which we will name hereafter.

Yours, Truly,

HICKOK & Co."

On the day of the date of this letter, a meeting was held, of which the following is the record on the books of the company.

"At a meeting of the trustees of Vulcan Mining Co., held this day at the office of Messrs. Hickok & Co. — present Messrs. Hickok, Pearsall, Smith, and Barry.

Mr. Pearsall was called to the chair, and Mr. Barry appointed secretary, *pro tem.*

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Mr. Knapp having presented the estimate of expenses required for prosecuting the operations of the company until the first of June next (in accordance with a vote of the company to that effect passed at a special meeting held on the 20th ultimo), on motion, resolved,

1. That the trustees proceed forthwith to call in the balance due on the last assessment authorized by the company, being twenty-eight (28) cents per share.

2. That the following sums, comprising the aforesaid estimate furnished by Mr. Knapp, be, and are hereby, appropriated for the purposes named therein, and that the treasurer be authorized to disburse them accordingly as soon as required — amounting in all to eight hundred and five 58-100ths dollars, viz.:

For outfit and supplies for 6 men to 1st June next, ...	$242 58	
Wages due to men, ...	263 00	
Mr. Knapp on acct., ...	100 00	
Mr. Knapp, for expenses of freight and transportation, and contingencies, to be accounted for by him, . . .	200 00	
		$805 58

The meeting then adjourned."

Knapp, after this meeting, returned to Detroit, having first had, according to his testimony and that of Hickok, conversation with Hickok about the opposition manifested on the part of the Vulcan Co. to making the purchase of location 98, in which Hickok expressed himself very anxious that the purchase should be made by the Vulcan Company, and confident that, if Knapp could make a favorable bargain with Bates for the purchase of the whole or a portion of the Ontonagon Company's location, the Vulcan Company would accept it. Hickok, therefore, instructed Knapp to make such a contract for the purchase, if possible, and send it to him at New York, assuring Knapp that he would attend to having the business closed

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up there, while Knapp should go on up the lake and prosecute his mining operations. Accordingly, Knapp proceeded to Detroit and entered into a contract with Bates, assuming to act as agent of the Vulcan Mining Company, for one half of location 98, at the sum or price of $1,600, to be paid by the company, and sent it by mail to Hickok.

In the negociations attending the making of this contract, Knapp appears to have had the assistance of complainant, and to have consulted with Mr. Conger, a member of the Baltimore Company.

After making this contract, Knapp purchased supplies and provisions in Detroit for the miners, and went up to take possession of the new location in behalf of the Vulcan Company. On his arrival at the Saut he found that there would probably be difficulty in getting possession, and under the advice of Mr. Harvey, and Col. McNair, the mineral agent of the United States, he returned to New York in order to have the purchase fully consummated and closed up with the company, so that proceedings might be had, if necessary, to dispossess those who were wrongfully holding possession of the location.

Immediately on the receipt of Knapp's letter, which enclosed the contract with Bates, and also a letter from Bates, Hickok addressed to Bates the following letter:

"NEW YORK, October 12th, 1847.

"GEO. C. BATES, Esq., Detroit.

"*Sir:*—Yours of the 5th inst., to Mr. Samuel Knapp, was forwarded to me, together with your agreement with Mr. Knapp for the sale of one half of location 98, on the Ontonagon River, belonging to the Ontonagon Mining Company. Mr. Knapp was duly authorized to make any purchase for the Vulcan Company that he deemed best for their interest; and in the purchase of one-half of the Ontonagon location, the trustees approved of his course.

The request to be complied with in your letter, will be attended to in a few days.

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Mr. Knapp omitted to give your authority for the sale of this location. When I forward the certificate of deposit, I will also send a special power of attorney, for you to have executed by the trustees of your company, for you to convey to the Vulcan Mining Company the one-half of said location.

Very respectfully yours,

"WM. HICKOK, *Treasurer.*"

Hickok claims that, when he wrote this letter, he believed the company would ratify the contract Knapp had made. A meeting of the company was had the next day, and the papers, including Hickok's letter to Bates, submitted; when the following action only, so far as appears by their records, was had:

"NEW YORK, Oct. 13th, 1847.

"At a special meeting of the Vulcan Mining Co., held this day at the office of Messrs. Hickok & Co. — present Messrs, Hickok, Lambert, J. M. Smith, C. E. Smith, E. C. Roberts, Pearsall, and Galloway. Mr. Roberts was called to the chair, and Mr. Galloway appointed secretary *pro tem.*

The minutes of the last meeting were read and approved.

Communications were presented, and read, from Mr. Knapp, agent of the Company, from Geo. C. Bates, Esq., of Detroit, and Jonas H. Titus; all of which, on motion, were directed to be entered on file."

Considerable contradictory evidence was given as to the proceedings at this meeting, and Hickok testified that he was censured severely for writing the letter to Bates, above given. Galloway testifies with respect to the purchase, as follows:

"I have some knowledge of the purchase, by said Vulcan Mining Co., of part of the tract of the Ontonagon location. I think it was No. 98. This purchase was made, I think, in the fall of 1847. Mr. Knapp came to New York,

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and his operations, he stated, on the Vulcan Co.'s location had not proved successful; and he stated he was not willing to go back without special orders from the company, as he seemed to have his fears about striking a vein of copper; but stated if they would purchase a portion or the whole of the Ontonagon location, he was satisfied he should be successful; that he had examined it, and it had exhibited a great show of copper. The question came up then before the Vulcan Co., as to the propriety of going on with the mining operations — of extending the business for the purpose of mining. Mr. Knapp was authorized by the Vulcan Co. to make the purchase. He did so, as the matter was understood in the office of the company. As I understood it, he went up for the purpose of purchasing, and did purchase this location of George C. Bates, one of the trustees of the Ontonagon location. Mr. Hickok stated that it would be best to keep in with Mr. Titus, as he could be of great service in accomplishing the purchase. After the conclusion of this matter, some of the Vulcan Co. did not want Titus to have any thing to do with it, and it was talked about changing the matter after it was concluded. William Hickok thought the best way would be to undo that bargain, and have the matter taken out in his own name; namely, the leases conveyed to him, and he would turn them over to the parties of the company; and it was done so, as I understood. Thence sprung the Minnesota Co." C. E. Smith, Roberts and Pearsall were sworn as witnesses for defendant, and their testimony went to support that of Hickok. Smith says:

"On the 13th October, I was present at another meeting, when, for the first time, I heard that Mr. Knapp had made a contract with the Ontonagon Company to purchase half of its location, thereby exceeding the power given him by the resolution passed at the meeting of the 20th September. I opposed this contract at the time, and all and every measure that tended towards the company's making

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a purchase of any new location. I also heard a letter read, written by Hickok to Geo. C. Bates. I censured him for so doing, on the ground that he had no right to write such a letter without conferring with the trustees. As a trustee and a stockholder I disapproved of the letter. All the other members present took the same grounds, except Mr. Roberts, who was president of the meeting. I believe he did not express an opinion on the matter. One of my reasons for opposing the company's making the purchase was, that the company was in debt, and the trustees were prohibited by their articles of association to run in debt, or to incur any obligation of debt, without a vote of the stockholders. There had been no such vote, and I was unwilling as a trustee, to lay myself individually liable for the benefit of others."

Knapp again went to New York about October 27th, 1847, and while there, it was arranged that he should return again to Detroit, and take a transfer of one-half of location 98 to Hickok, in his individual name; which was done accordingly; and by an assignment duly executed by the trustees of the Ontonagon Mining Company, and acknowledged by them on the 8th day of November, 1847, an undivided one-half of location 98 was duly assigned, transferred and set over to William Hickok, with a stipulation as to a division of the same with the Ontonagon Co. and the right in Hickok to the choice of one-half when a division should be made by a line drawn through the middle.

In thus closing up the matter with Bates, Knapp again had consultations with Conger and complainant, but as to what was said the evidence is again conflicting. Conger says Knapp "told me that the Vulcan Mining Co. had purchased, or made arrangements to purchase, one-half of location No. 98 — such one-half as they should elect to take. He said, by an understanding with the members of the company in New York, the interest in said Loca-

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tion No. 98 was to be assigned to said Wm. Hickok in trust for the Vulcan Mining Co., and mentioned as a reason for this mode of assignment, that Hickok had made advances for the expenses, &c., of the company, and proposed to make still further advances, and wished to take a transfer of the interest to himself in trust, by way of securing himself for these advances. I think I had a statement in writing from Mr. Knapp, signed by himself as agent of the Vulcan Mining Co., setting forth the above facts as to the transfer to Hickok, and the reasons why he wished it so made. I have since repeatedly searched for this paper among my files and papers, but have been unable to find it, and conclude that it has been lost. If my impression is wrong as to having actually received such a paper from Mr. Knapp, I am confident that he repeatedly offered to execute a memorandum in writing, embodying the above mentioned facts as to the transfer in trust to Mr. Hickok, and the reasons for such transfer.

"Mr. Knapp consulted Mr. Titus, because he was president of the Baltimore Mining Co., and represented the interest of that company in the Vulcan Mining Company—that interest being a right of the president of the Baltimore Mining Co., for said company, to a certain number of shares in said Vulcan Mining Co. I was a member of the Baltimore Mining Co., and was interested also, through the agreement of the president of that company with the Vulcan Mining Co., in said latter company; and the reason why I at first objected to the assignment in trust to Hickok, was because of my aforesaid interest in said Vulcan Mining Co. through the Baltimore Mining Co. I was anxious that the portion of the location sold should distinctly and clearly appear to be the property of the Vulcan Mining Co., so that there should be no question about the rights of the Baltimore Mining Co., under its interest in the Vulcan Mining Co. The effect of this proposed assignment to Hickok upon the rights of the Balti-

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more Mining Co., under its claim to stock in the Vulcan Mining Co., was a particular subject of conversation between myself and Knapp at the time above referred to; and Mr. Knapp then distinctly stated, that as the purchase was for the benefit of the Vulcan Mining Co., the assignment to Hickok in trust for them would leave the rights of the Baltimore Mining Co. the same as if the assignment had been made directly to the Vulcan Mining Co.; and it was distinctly to show this that he either did give, or offered to give, the paper to which I have above referred. Upon this understanding only I consented that the assignment should be made in that form. I and Mr. Titus had been active in aiding Mr. Knapp in the preliminaries of this purchase. It was the understanding with Mr. Bates, the representative of the Ontonagon Co., owning Location 98, before Mr. Knapp went to New York, that the Vulcan Mining Co. should have the privilege of purchasing one-half of said Location No. 98, and that Mr. Bates had agreed with Knapp to assign one-half of Location 98 to the Vulcan Mining Co. It was further understood at the same time, between Mr. Knapp, Mr. Titus, and myself, that if the Vulcan Mining Co. wished the Baltimore Mining Co. to take and pay for one-half of this purchase in connection with them, they would assent to such an arrangement; but the Vulcan Mining Co., it was understood, had the privilege at the same time of taking the whole of said purchase. For these reasons, I supposed that myself and Mr. Titus could have prevented the assignment of the above purchase to any other than the Vulcan Mining Co."

Knapp says, "When I got [to Detroit], I think I met Conger and complainant there. I had some talk with them about what had transpired in New York. Had a good deal of talk with Conger, but not much with complainant, as he had just lost his wife; but I saw him. I think I told Conger what had transpired in New York, and how I was to have the papers made out — the transfer from the Ontona-

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gon to Hickok. Conger very strongly objected to the way in which the papers were to be made out, and seemed very much displeased with the way they were to be executed. He said that, in the way the papers were to be executed, it just cut off the Vulcan and Baltimore Cos. entirely. I told him that I was satisfied that it would all be right, and that the Vulcan Co. would finally have the purchase. I told him that I believed if the Baltimore would pay their proportion — their *pro rata* to the eight hundred shares which they had in the Vulcan Co. — that the Vulcan Co. would take the location off of Mr. Hickok's hands. I told them I should be willing to do this, so far as I was concerned; and I think they both said they would be willing to do it too. I don't recollect all that was said. There was a good deal of dissatisfaction expressed, especially by Mr. Conger. Mr. Titus (complainant) further promised that he would go down as soon as he could get time, and attend to it. I thought if he would do that, there would be no obstacle, but what could be removed, to the Vulcan Co. making the purchase of Mr. Hickok. Feeling this assurance, I did all I could towards removing Conger's opposition to having the papers executed in the way they had been thus far executed. I believe I offered to put my statements in writing; I think I did do so. I think I never *delivered* any statements in writing to him — am quite sure I never did. The statements in writing which I did make, I think I tore up after I got to Lake Superior. I don't remember all he said. There was some considerable contention between Conger and me — some disagreement on this point about the papers. Conger used some pretty sharp words. I do not remember whether or not he threatened to break up the contract with Bates, but I had some fears."

The above is but a portion of the testimony of these witnesses, but it is sufficient, without giving the rest, or that of others, to show the views and claims of the parties respectively in reference to the transaction.

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Knapp immediately went on and obtained possession, and prosecuted mining operations thereon from some time in December, 1847, to about July, 1848, in the name of the Vulcan Mining Company, having removed from the location of the company their mining tools and implements, and transferred from one location to the other the men in the employ of said company, — continuing to employ them under contracts of the company.

April 18th, 1848, Knapp sent Bates the following:

"ONTONAGON, April 18th, 1848.

GEO. C. BATES, Esq.

DEAR SIR: On examination, the Vulcan Mining Company have selected the north half of Location No. 98, as their choice between the two halves.

Yours, &c.

SAMUEL O. KNAPP, *Agent.*"

The purchase of the Ontonagon location was paid for by Hickok & Co.,—complainant, at their request, signing, as drawer of one and endorser of the other, two of the drafts by which payment was made. It was proved that, from time to time before, they had advanced moneys to aid in carrying on the mining operations of the Vulcan Co., and that on various occasions after this purchase, they had assumed that it was made for that company.

The following letter is alluded to in the opinion of the Chief Justice:

"NEW YORK, Oct. 30th, 1847.

"JONAS H. TITUS, Esq.

"*Dear Sir:* — Your favor, by friend Knapp, was handed me in due time. Mr. K.'s return was quite unexpected; but I think his course a very prudent one, and of the highest importance to the company. I have the following proposition to submit to you, which can be carried out, and with the same benefit to you and our firm. It is this: It shall be represented by others that your company has abandoned its location, which you can credit. I will make the

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same representations here, and manage to buy up all of the stock. During this time, however, your company can be at work on such part as Mr. Knapp will set aside for it, on the Ontonagon location. You and I will arrange the preliminaries with regard to purchase of a part of location purchased from Ontonagon Company. You can then submit the proposition agreed upon, and I will put it through for you. I think this plan would be as advantageous for your company, and such a course would be more satisfactory to the members of our company, so long as they did not know the object, which, of course, they could not. The stock in the Baltimore could not be lessened any in value by such a course, and it would give you and ourselves a chance, who has stood the heaviest expenditure of the company, to make something by the operation.

"Please let us hear from you by return mail, and state if this course meets your views. * * *

Yours, truly,

"WM. HICKOK.

"Confidential between ourselves, Mr. Knapp and Mr. Conger."

The following action of the Vulcan Co. appears from its records:

"At the annual meeting of the stockholders of Vulcan Mining Company, held December 6th, 1847, the following preamble and resolutions were adopted:

"*Whereas*, The trustees of this company have reported to this meeting the fact of Mr. Knapp having left their location, and ceased his mining operations thereon; Therefore,

"*Resolved, first*, That the meeting do not consider it expedient to resume their mining operations at present.

"*Resolved, second*, That Mr. Knapp be required to furnish the company, forthwith, with his accounts fully made up to the date of his leaving said location, together with a statement of all balances due to workmen, &c., up to

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the same period, and an exact inventory of the property and effects of all kinds belonging to the company."

From the time when Knapp removed from the Vulcan Company's locations in the fall of 1847, all mining operations thereon ceased, and they have never been resumed; but that company has never been dissolved, and still continues to exist.

On June 1st, 1848, the principal shareholders of the assessable stock of the Vulcan Company, in order to possess themselves of the benefit of the Ontonagon purchase, and at the same time exclude the shareholders of the Baltimore Company from any participation therein on account of their right to shares of unassessable stock of the Vulcan Company, proceeded to organize themselves into a new company by the name of "The Minnesota Mining Company, of New York," under articles of association, and by that name they received an assignment from Hickok of the purchase. This company was afterwards incorporated by an act of the Legislature.

The assignment from Hickok recited, that he held the purchase from the Ontonagon Co. "as trustee for himself and the persons who have formed" "the Minnesota Mining Co. of New York," and acknowledged a nominal consideration only. And the association in their articles recite their "having purchased, though William Hickok, the right" under the lease of Location 98.

The property of the Minnesota association was divided into 3,000 shares, none of which were made unassessable. This company was composed almost exclusively of those who were interested in the assessable stock of the Vulcan Mining Company, and they had in it, for the most part, the same shares they had in the Vulcan. In the fore part of July, 1848, they assumed the possession and control of the new location, and have ever since been engaged in mining thereon, with very satisfactory results. Since their organization the Minnesota Company have always refused

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to recognize any right on the part of the Baltimore Mining Company, or its shareholders, or of the complainant as president or trustee, or otherwise, to claim any part of its capital stock, property or effects, or to receive any share of the profits of their operations or business.

November 7th, 1849, complainant filed his bill, setting forth that the Vulcan Company never issued to him the 800 shares of stock according to their agreement, or any part thereof, or to any other person for the Baltimore Company; that the purchase of Bates was made for the Vulcan Co. with a full recognition of his rights and interest in the purchase, by virtue of the right to said stock; that the Minnesota Mining Co. was formed with the intention of carrying on, under its name, the mining operations of the Vulcan Co., and for the purpose of defrauding complainant of his rights against the Vulcan Co.; that the change from the Vulcan to the Minnesota Co. was merely nominal, while the interests of the shareholders of the new company remained substantially the same that they were in the old, and all the property of the Vulcan Co. was transferred to the Minnesota, without consideration; that the transfer to him or to the Baltimore Co. of the 800 shares of stock in the Vulcan would now be of no value, and a mere mockery of rights; that the Vulcan Co. is now to all practical purposes dissolved and dead, and the Minnesota fraudulently and collusively substituted in its place, and is now in fact and in truth the old Vulcan Mining Company, carried on under the act of incorporation obtained by them; and that the corporators of the Minnesota, at the time of the transfer of said location 98 from the Vulcan Co., were well aware of the agreement and obligation of the latter to convey said stock to complainant, and the Minnesota Co. is now liable to complainant in the same manner as the Vulcan Co. was. And praying that said Minnesota Co. might be decreed to issue and deliver to complainant, as president of the Baltimore

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Mining Co. for the use thereof, one-fifth of the shares of the whole capital stock of said Minnesota Co., made unassessable forever, and to account to complainant for their earnings and profits.

The answer admits the arrangement between Titus and Hickok and his associates, as stated in the bill: "admits, that it was contemplated that the interest of the said new company proposed to be formed should be divided into four thousand shares of stock; and that said Hickok and others, as a part of the consideration of said assignment of said lease, agreed to and with the complainant, as president of the Baltimore Mining Company, that, upon the formation of said proposed new company, eight hundred shares of unassessable stock in the same, to be numbered from 1 to 800, inclusive, should be issued to the president of the Baltimore Mining Company, to be endorsed by him, and distributed among the shareholders of said company; and that said new company should be organized, and stock should be issued, within sixty days after the date of said agreement;" and admits also the organization of the Vulcan Co. as alleged.

The answer also admits the bargain by Knapp, assuming to act as agent for the Vulcan Co., with Bates, for the half of location 98, but says that the company, dispirited by their bad success, declined to ratify his action, and that the purchase was subsequently made by Hickok on his own private account; that at that time this location had no fixed or marketable value; that the little labor which had been performed upon it by the Ontonagon Co. had failed to develope any valuable mineral veins thereon, and that company had become dispirited, and nearly abandoned working; that its value for mineral purposes could then only be judged of by surface indications, which have always proved extremely unreliable; that before this could be determined, the expenditure of much capital and industry was required, and that it was then, owing to the many failures of mining

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adventures on Lake Superior, extremely difficult to induce capitalists to engage in such hazardous undertakings.

The answer denies that the Vulcan Co. ever carried on, or directed or authorized to be carried on, any mining operations on location 98, in their name or for their benefit; says that the Vulcan Co., discouraged by its ill success and fruitless expenditures, has never resumed its mining operations since December, 1847, but has never been in any way dissolved, and still exists in fact as well as in name, still retains all the interest it ever had in mineral lands, and were the prospects sufficiently encouraging, has the same capacity as formerly to prosecute mining operations thereon; and it denies the identity of defendant with the Vulcan Co., or that the Minnesota was formed for the purpose of carrying on the operations of the Vulcan.

The answer further alleges, that the Minnesota Company has expended upwards of $110,000 in mining operations and improvements connected therewith on said location 98; over $30,000 of which was expended before the Minnesota Co. was made aware of the claim now set up by complainant. It states, on information and belief, that the Vulcan Co. has ever been and still is ready to issue and deliver the 800 shares of stock to Titus according to their agreement, and that in or about the month of June, 1847, the same was made out and offered to complainant, who declined to receive the same. And it prays the benefit of a demurrer to the bill.

S. A. Goodwin, *M. Wisner*, and *G. V. N. Lothrop*, for complainant:

Mr. Goodwin:*

The objection for want of parties, taken for the first time at the hearing, is dilatory only. For if good, the court would order the cause to stand over to bring them in, and without costs: — 1 *Barb. Ch. Pr.* 321 *and cases cited.* Or

* An abstract of the briefs is given on the question of parties only.

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it would disregard mere formal parties, and decide the case on the merits:—1 *Sumn.* 173; 1 *Stock.* 401.

But the shareholders of the Baltimore Co. are not necessary parties. Titus is trustee for them. Their rights exist against him as trustee, and he is, by the terms of the arrangement, to distribute the stock to them *pro rata*, and endorse the same over to them. A trustee filing a bill to collect the trust fund, or obtain possession of the trust property, need not make his *cestui que trust* a party:—4 *Paige*, 34; *Story Eq. Pl.* §157; 2 *Gray*, 280; 1 *Beavan*, 91; *Calvert on Parties*, 212, 215; 5 *Hare*, 272; *Wal. Ch.* 465, *and cases cited;* 10 *S. & M.* 301; 3 *Ves.* 76; 1 *Ves. Sr.* 101; 1 *Stew. & Port.* 467; 4 *Hare*, 126.

The Minnesota Co. is composed of the Vulcan partners, except Titus. It has received the property and profits of the excluded partner, subject to all equities. By becoming incorporated for their own convenience, they could not deprive him of vested rights, but became liable in their corporate name:—16 *How.* 327; *A. & A. on Corp.* §§ 6, 379, 381, 382, 391.

Mr. Lothrop:

In equity the rule is that all persons must be made parties whose presence is necessary to make a complete decree: *Story's Eq. Pl.* § 76. Beyond this there is no absolute rule or principle:—*Ibid.* § 76*c*, § 77. And the bill may be so framed, as to scope or relief, as to dispense with parties who would be otherwise necessary:—*Ib.* §§ 214, 214*a*. And a mere nominal or formal party may be dispensed with where the objection is only taken at the hearing, though such party might be properly joined:—*Ib.* § 221 *and cases cited*, § 642; *Kean v. Johnson*, 1 *Stockt.* 423.

It is well settled that a *cestui que trust* is not always a necessary party to a suit brought by the trustee; and I take it that the true and reasonable distinction is this: Where the bill is for the purpose of the *execution* of the trust, or its *object* is to destroy the trust, or trust property, the

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cestui que trust is a necessary party. But where, in the language of CH. MANNING, it is "no part of the object [of "the bill] to affect the existence of the trust, or the trust "property, *except to place it in the hands of the trustee*, "*who can not till then execute the trust*," it is not necessary to make the *cestui que trust* a party: — *Morey v. Forsyth*, *Walk. Ch.* 467. And this, I take it, is the result of the discussion on the subject by Calvert in his Treatise: — *Calvert on Parties*, *pp.* 7, 8, 210, 211. And it is fully confirmed by the case of *Hall v. Sullivan R. R. Co.*, *Law Rep. July*, 1858. It was unquestionably the adjudicated law of the state when this bill was filed: — *Sill v. Ketchum*, *Harr. Ch.* 423; *Cook v. Whalen*, *Harr. Ch.* 443. These cases, with those referred to in the brief of Mr. Goodwin, seem to me to dispose of this question.

The decree in this case asked for would, if granted, merely put the trustee in a position in which he might proceed to execute the trust. The sole right involved in this suit is, whether he is entitled to receive the stock claimed, or its equivalent. What he shall do with it, or what are the rights of the *cestuis que trust*, is not at all involved. Every party necessary to the consideration of this *one question* involved, seems to me to be before the court. As to this question, Titus is the *representative* of the *cestui que trusts*.

But suppose it should appear that there are other persons who ought to have been made parties, what then? As the objection is made for the first time at the hearing on pleadings and proofs, it is not entitled to favorable consideration. Hence, if the party omitted is merely a nominal or formal one, the objection will not be allowed: — *Story Eq. Pl.* § 221 *and cases cited*, § 542. And in such cases the court will proceed to a decree if it can possibly do so: — *Story Eq. Pl.* §§220, 237, 541, 542; *Hanny v. Cooke*, 4 *Russ.* 34, 54; *Lambert v. Hutchinson*, 1 *Beavan*, 277; *Kean v. Johnson*, 1 *Stockt.* 401. And ad-

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vantage can not be taken of the *non-joinder* of a co-defendant, unless it will operate to the prejudice of defendants: — *Story Eq. Pl.* § 257, *in note.*

But even if, to make a decree, it should be thought necessary to add parties, the court will, when the objection is taken at the hearing, allow the cause to stand over, with leave to amend the bill by making new parties, and connecting them with the case by making proper averments: — *Story Eq. Pl.* §§ 237, 541; *Milligan v. Mitchell*, 1 *M. & Cr.* 443; *Covert v. Jeffery*, 1 *S. & Stu.* 106; *Orton v. Knable*, 3 *Wis.* 601; *Bull v. Bell*, 4 *Wis.* 54; *Malin v. Malin*, 2 *Johns. Ch.* 238.

S. T. Douglass, *H. H. Emmons*, and *J. M. Howard*, for defendant:

I. *All the members of the Baltimore Company should be parties to the bill.*

There is no averment or proof of numerousness, and none that the bill is filed by one for or in behalf of all; nor is this a case where such a bill would be sustained if the averments were made: — *Calvert on Parties*, 41, 28, *et seq*; *Story's Eq. Pl.* §§ 94, 96, *et seq.*, 107, 115.

In order to bring a case within the exception to the general rule as to parties, the number of persons must be so great, or so liable to change, that to require all to be made parties by name would be a practical inconvenience, amounting almost to a denial of justice: — *Calv. on Part.* 39, 40; *Harrison v. Stewardson*, 4 *Hare*, 530; *Brainbridge v. Burton*, 2 *Beav.* 539. And the bill must show on its face that it is brought on behalf of all: — *Story's Eq. Pl.* §§ 95, 99, 107, 126; *Calv. on Part.* 31; *Douglass v. Horsefall*, 1 *Sim.* 81 *to* 184. And the facts relied upon, in order to dispense with making all parties by name, must be averred: — *Howland v. Baker*, 3 *Hare*, 74, 75. And, if traversed, must be proved on the hearing, or the bill can not be maintained: — 3 *Eng. L. & E.* 170.

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In those cases where one or more persons are permitted to sue on behalf of themselves and others, all the persons on whose behalf the suit is brought, as well those named as complainants as those who are not, are regarded as parties, and may participate in all proceedings until its final termination:—*Daniels Ch. Pr.* 1664; *Story's Eq. Pl.* § 96. And the court institutes the proper inquiries as to who are the persons represented, and what are their interests, and in their decree determines the right of each, and distributes the fund in controversy to such only as come in and claim it:—*Good v. Blewett*, 19 *Ves.* 336; *Story's Eq. Pl.* § 99; *Weatherly v. St. George*, 2 *Hare*, 629.

The present bill can not be maintained upon the ground that it falls within the class we are considering. It contains no one of the requisite averments to bring it within that class. And the complainant will not, probably, claim that it is brought on behalf of all the Baltimore stockholders, since this would disqualify all his most material witnesses.

The bill, then, being one by the complainant solely, and under which he must show in himself the *legal title*, or a right to have conveyed to him the *legal title*, to the interests he claims, and a right to hold them, when so transferred, in trust for his beneficiaries, we proceed to show that, upon the pleadings and proofs, he makes no such case.

1.—*The contract is between Hickok & Co. and the members of the Baltimore Company directly. It is their contract in law, and not that of Titus in trust for them.*

This, we think, will appear from the literal meaning of the contract, from its legal incidents, and from its nature.

2.—*The words of the contract are unambiguous, and, in express terms, describe Titus as agent.*

The counterpart does not even mention Titus by name,

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but says the shares are to be delivered to the *President of the Baltimore Company.* That as such agent he can not maintain suit, see *Blair v. Agar*, 1 *Sim.* 37; *King of Spain v. Wallack*, 6 *L. J. Ch.* 165; *Jones v. Hunt*, 1 *Hen. & Mumf.* 470.

b.—*Its legal effect is what its literal terms import—the contract of the company, and not that of complainant.*

The intention binds.—See *Randall v. Van Alstine*, 19 *Johns.*; *Detroit v. Jackson*, 1 *Doug. Mich.* 106; *Story on Agency*, § 154; 4 *Eng. L. & Eq.* 358; 11 *Eng. L. & Eq.* 430; 1 *H. & Nor.* 165.

Even if made with the agent personally, it having been for the benefit of the company, and the consideration having moved from the company, the stockholders of the company would have been necessary parties:—*Hook v. Kinnear*, 3 *Swanst.* 417; 2 *Spence Eq. Jur.* 286, 287; *Small v. Atwood*, 1 *Younge*, 407; *Chadwick v. Marsden*, 12 *Eng.* 18; *Crocker v. Higgins*, 7 *Conn.* 342.

The contract, by its terms and form, is *in law* the contract of the firm.

"As president and duly authorized agent," means no more than "as member of the *firm* and duly authorized agent." He contracts for the company then. Is this not the contract of the individuals of the firm, if they sanction it?

If the contract was by "John Doe, a member of and duly authorized agent of the firm of Doe & Co.," would this court patiently listen to an argument that this was his personal contract, in trust for his firm? That is exactly the case before the court.

c.—*The nature and subject of the contract render the idea of a trust wholly impossible. A trust can not be predicated of such a transaction.*

Of what does complainant claim to be trustee? The bill answers us. Of the shares of "*stock*" which Hickok agreed the Vulcan Company should deliver.

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We make no apology for placing here the following truisms. We fight against nothing but what is with apparent soberness stoutly insisted upon by our learned opponents, and formally announced as the sole ground of equity in the bill against this defendant corporation.

The court will see, therefore, trivial as it may deem such an argument, that the great ground of difference between the litigants here, is not so much as to the principles of law in relation to parties, in the abstract. The complainant concedes he can not stand here as a partner. The sole strife is to impart to the words "stock" as used in the contract and bill, the quality of a *chattel;* the faculty of property; to make it a thing, instead of a mere certificate, or evidence, of an interest in some *other* thing. The whole theory of the bill, the conduct of the cause, and the argument which claims complainant is a *trustee*, is predicated upon the idea of the legal existence of some aggregate body with "*shares of stock*," as distinguished from the natural persons, Titus, Hickok & Co., with their individual interests in the property of the firm. And, although counsel may disclaim an intention to confound things so completely distinct as a corporation and the natural persons which compose it, still the bill in terms so does, and it can be sustained on no other ground than that which involves the idea of ownership in "*stock*" independently of the property it represents.

The following are cited only to show the utter want of identity in the law of the stockholders and projectors of a corporation with the corporation itself, and that they are in no sense *owners* of its property; that they are not even beneficiaries or *cestuis que trust* within the meaning we are here considering:—*Ang. & Ames on Corp.*, §§ 307, 308, *and cases cited in notes;* 9 *Barr*, 27; 10 *W. & S.* 397; 4 *Paige*, 406; 3 *Comst.* 182; *Brooks v. Hill*, 1 *Mich.* 123; 2 *How.* 497; 39 *Eng. L. & Eq.* 32; *Redf. on Railw.* 634, §3; 12 *Vt.* 324; 16 *Pick.* 412; 15 *Vt.* 519; 28 *Vt.* 564.

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Now what is signified in the contract and the bill by "*shares of stock*," is an *ownership in co-partnership property*. He who holds them owns an undivided part in every article and acre owned by the company. He does not hold something distinct *from*, but an interest *in*, the capital. He is joint tenant — is seized "*per my et per tout*" in all its effects. They are but parts of the co-partnership agreement between the members of the Vulcan and those of the Baltimore Company; and when it was agreed they should be delivered to Titus, it was not to invest him with a title. They are not things of themselves; they are not chattels, subject to larceny at common law, any more than a receipt, or other certificate. They are, in no sense, the subject of property, and so not of a *trust*. As well might a man be said to be trustee of a *deed* which conveyed land to another; or of a receipt for money, which acknowledged a past payment. Such instruments, owing to their very nature; to the fact that the subject of ownership, and the object of value, is the property or transaction to which they *refer*, can not be the subjects of trust.

The case, then, is reduced to this: The complainant must be *trustee* of the *act* or *agreement* by which he and his associates entered into co-partnership with Hickok and others. Or it may be said that he entered into *partnership himself*, in trust for his associates. If so, the law executes the trust, and gives the beneficiary a present vested interest: — 10 *Met.* 349; 28 *Miss.* 432; 13 *S. & M.* 658; 1 *Smith Lead. Cas.* 491.

Indeed, what would his beneficiaries be but dormant or secret partners, if you follow out fully and literally the transit of this title as complainant contends? If he took the partnership interest *in trust*, this gave *in presenti*, a vested actual interest in the whole community.

The idea that *partnership property* can be put into a new joint association, and one of the firm hold the interest growing out of this common contribution of capital *in trust*

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for his fellows, without, in this court, making them co-partners with him, is not only erroneous, but at war with every elementary axiom in relation to trusts and co-partnerships.

2. *If we grant that the complainant is in any sense a trustee, he can not, in the circumstances of this case, maintain the bill without his beneficiaries. They must be co-complainants.*

We shall not stay to argue this upon principle: it is fully settled by the authorities: more especially does the rule apply where the bill, as here, is filed to *create* the complainant trustee: — *Kirk v. Clark*, *Pre. in Chy.* 275; *S. C.* 3 *Vesey*, 76, *note.* The case is literally applicable: — *Story Eq. Pl.* §§ 149, 215, 216, *note* 5, §§ 201, 205, 207, *note* 1, §§ 207*a*., 207*b*., 209; 1 *Ball & B.* 182; 2 *Sim. & St.* 184; 2 *Hare*, 628; 19 *Ves.* 336; 2 *Sim. & St.* 19; 1 *Sim. & St.* 106; 1 *Cr. & Ph.* 376; 4 *Hare*, 115; 17 *Ga.* 222; 1 *Green Ch.* 305; 1 *Paige*, 23; 2 *Johns. Ch.* 238; 2 *Stew. & Port.* 361; 2 *McLean*, 30; 3 *Hare*, 69; 1 *Dan. Ch. Pr.* 267, *and note to* 279; *Story's Eq. Pl.* §§ 207, 209.

Where property is given to a trustee for *cestuis que trust*, the court will pay it to the *cestuis que trust*, and not to the trustee: — 2 *Hare*, 528; 19 *Ves.* 336.

Moreover, the bill prays for an account of past dividends, &c. The stockholders of the Baltimore Company are necessary parties to that account: — *Green v. Lisson*, 2 *Curtis C. C. R.* 171; 4 *Mylne & Cr.* 286.

The following case is much like that claimed to be proved by complainant: — 1 *Mylne v. Craig* 559, *Mann v. Malachy.*

II. *The members of the Vulcan Company are necessary parties.*

The complainant's equities are founded:

First, Upon an agreement to which the Vulcan Company is claimed to be one of the parties, which agreement the

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court is asked specifically to enforce. As parties to the agreement, the Vulcan Company members are necessary parties.

Secondly, Upon an alleged conveyance by the Vulcan Company to the Minnesota Joint Stock Company, of the north half of 98, for the purpose of defrauding the Baltimore Company of its interest in the location. As parties to the alleged fraud, they are likewise necessary parties to the suit:—*Story Eq. Pl.* § 153; 1 *Meriv.* 240, 242; *Calv. on Part.* 19, 24, 80, 81; 39 *Eng. L. & Eq.* 225.

III. *For the same reason the stockholders of the Minnesota Joint Stock Company should have been made parties; for the joint stock company and corporation are not in law identical:*—39 *Eng. Law and Eq.* 28, *and other cases cited ante.*

IV. *Hickok, if he held in trust for complainant, must be a party:*—*Story Eq. Pl.* § 211, 209—If a trustee's assignment is a breach of trust, he should be made a party:—*Coop. Eq. Pl.* 3; 7 *Ves.* 3, 11.

In the last case it is said the trustee should be a party, because he will be made to stand as surety for having broken the trust.

Story Eq. Pl. § 155—If assignor is *trustee*, and the assignment is breach of trust, then he must be a party. The proper decree is that he stand as security, &c. It appears to be a general rule that if *cestuis que trust* file a bill to pursue property sold with notice, the *trustee must be made a party:—Malv. on Part.* 207.

Story Eq. Pl. § 221—If assignment is in fraud, trustee must be made a party.

These parties can not be dispensed with, even if it be practically a denial of justice to require them.

V. *As an account is sought of past dividends, the stockholders pro tem., of the Minnesota Company, who had received dividends, were necessary parties, for they are*

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each of them bound to contribute one-fifth of the dividends they have received: — *Chitty Eq. Dig.* 25, 33, § 14; 6 *Railw. Cas.* 670; 12 *Beav.* 125.

MANNING J.:

Complainant claims, under a written contract, a right to eight hundred shares of unassessable stock in the Vulcan Mining Company, and has filed his bill for the stock against the Minnesota Mining Company, an incorporation, alleging they are one and the same company, or that the Minnesota Company is the Vulcan Company under a new name.

The testimony in the case does not sustain their identity. On the contrary, it shows the two companies are not one and the same, but separate organizations, having nothing in common between them. The Vulcan Company is still in existence, and the owner of the mining location purchased for it of the Baltimore Company.

It follows, as a necessary consequence, that for the stock in question the bill should have been filed against the Vulcan Company, instead of the Minnesota Company; and that it should have been filed by the Baltimore Company, unless complainant is a trustee for the stockholders of that company, under the agreement of the 21st November.

Is complainant a trustee under that agreement? To solve this question recourse must be had to the agreement itself, which is a contract between the Baltimore Mining Company, by complainant as its president and agent, and Hickok & Co. and their associates. It is not a contract between the latter on one part, and Titus on the other. This is not pretended; nor is there any ground for such a claim, as complainant's agency is stated in the contract itself. The leases to be assigned were the property of the Baltimore Company, and the eight hundred shares of unassessable stock were the consideration, in

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part, of the assignment, and must be regarded as the property of the company, unless by some act of the company the stock was to be severed from its effects, and to become the individual property of its stockholders. No act of the company making such severance or distribution of the stock, or authorizing it to be made by complainant, is shown; and the provision in the contract for the delivery of the certificates of the stock to complainant, to be in harmony with the other parts of the contract, and come within the scope of complainant's authority, must be understood as an undertaking, and nothing more, on the part of Hickok & Co., and their associates, to deliver the certificates to complainant as the duly authorized agent of the company to receive them.

The supplementary agreement of Wm. Hickok, of the 23d November, is of no binding force whatever. There are several reasons why it should be discarded: 1st. It is an attempted alteration of the agreement of the 21st November, by Wm. Hickok alone, and not by Hickok & Co. and the other persons associated with him in that agreement; 2d. It is not supported or made binding by any new consideration passing between the parties to the original agreement; and, 3d. Its object would seem to be to give the unassessable stock to the shareholders of the Baltimore Company, instead of the company itself, and to create complainant a trustee to receive and make a *pro rata* distribution of it. As agent to sell, he had no authority, by contract or otherwise, to make a partition or distribution of the proceeds of the sale among the shareholders of the company. His authority "to make sale of the same (the leases), on such terms as he should think fit," conferred no such power. If I am correct in this, then it was not in the power of the complainant and the other parties to the agreement of the 21st November, had they all joined in the supplementary agreement, to have changed it in the manner indicated by the

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latter agreement. Nor does the supplementary agreement appear to have ever been ratified by the Vulcan Company. By its articles of association, it is provided, in express terms, that the 800 shares of unassessable stock shall be "transferred to the Baltimore Mining Company."

For the reasons stated I think the decree should be affirmed; and I should feel it to be my duty to refrain from expressing an opinion on the case made by the evidence, if I could see that the rights of any one not before us might be prejudiced by it, although the cause was disposed of in the court below on its merits.

It was insisted, on the argument, that the Minnesota Joint Stock Mining Company was formed by a majority of the shareholders of the Vulcan Company, for the purpose of appropriating to their use, and to the exclusion of the other shareholders of the Vulcan Company, a mining location that the Vulcan Company had contracted to purchase of the Ontonagon Company.

The questions, who should be parties to such a case, and what relief should be given, and against whom, I shall not discuss, as I do not think the case itself is made out by the evidence.

By whom was the north half of location ninety-eight purchased? I use the word purchased as including contract to purchase, the sense in which it is used by the witnesses.

Galloway says in his testimony, that "Knapp was authorized by the Vulcan Company to make the purchase;" and that "he did so, as the matter was understood in the office of the company."

As to Knapp's authority to make the purchase for the Vulcan Company, Galloway is clearly mistaken, as appears from the resolution of the company under which Knapp acted, and the testimony of Hickok, Knapp, Barry, Pearsall, and C. E. Smith, all of whom were at the meeting of the stockholders at which the resolution was passed,

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Galloway himself acting as secretary to the meeting, and signing the record. By the resolution, Knapp was "instructed to make inquiries in Detroit and elsewhere, on his return, as to the possibility of purchasing the whole or a portion of the Ontonagon Company's location, and to communicate to the company, as soon as possible, such information as he may be able to obtain on the subject." No authority was given him to make any contract whatever.

The resolution was passed under the following circumstances: Knapp, as agent of the Vulcan Company, had spent the preceding summer, with the workmen of the company in his charge, in making explorations for copper on the location purchased of the Baltimore Company, and had come to the conclusion that it was worthless for mining, and so stated to the stockholders at their meeting on the 20th September, at which the resolution was adopted. At the same time he called their attention to the Ontonagon Company's location, which was for sale, and recommended its purchase. Hickok and Galloway, as well as himself, were in favor of making the purchase. But the other stockholders were opposed to it — some, because the Baltimore Company would participate in the new adventure without contributing any thing toward the purchase; and others, because they were unwilling, from the experience they had already had, to embark in a new adventure, attended with so much hazard, and requiring a still further outlay of money. To this last class belonged Barry, on whose motion the resolution was passed. His reason for offering it and asking its adoption by the meeting we will give in his own words. He says: "Mr. Hickok evinced considerable feeling because his views were not favored by the meeting, and, in order to conciliate him, I suggested that time should be allowed to think and talk the matter over; that I had no objection that Mr. Knapp, on his return to Detroit, might be directed to make in-

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quiries, and ascertain whether the purchase of No. 98, or a part of it, could be made, and report to the company, by which time we should probably be better prepared to act definitely on the subject. I, therefore, by way of compromise, offered a resolution to that effect, which, after some opposition and much discussion, was finally adopted unanimously by the meeting."

Knapp, on his return to Lake Superior from the city of New York, where the meetings of the company were held, stopped at Detroit, and made a contract with Mr. Bates for the purchase of one-half of the Ontonagon location. On the 5th October, he sent the contract, with a letter from Bates to himself, to Mr. Hickok, who resided in the city of New York, and on the 12th October, Hickok wrote Bates a letter, stating that "Mr. Knapp was duly authorized to make any purchase for the Vulcan Mining Company that he deemed best for their interest; and in the purchase of one-half of the Ontonagon location, the trustees approved of his course."

On the next day, or 13th October, there was a special meeting of the company, at which Galloway was present, and again acted as secretary. The record of the meeting, after stating that "the minutes of the last meeting were read and approved," contains the following entry only of business transacted at it:

"Communications were presented and read from Mr. Knapp, agent of the Company, from Geo. C. Bates, Esq., of Detroit, and Jonas H. Titus. All of which, on motion, were directed to be entered on file."

Mr. Pearsall, in speaking of this meeting in his testimony, says: "On the 13th October, a meeting of the stockholders was held, and this agreement submitted to them" (the agreement between Bates and Knapp), "and a copy of a letter written by Wm. Hickok to George C. Bates" (the letter of the 12th October already mentioned). "I again expressed my decided opposition to this purchase, * * *

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most of the stockholders agreeing with me: Daniel A. Galloway was one of them."

C. E. Smith, another witness, says: "On the 13th October I was present at another meeting, when, for the first time, I heard that Mr. Knapp had made a contract with the Ontonagon Company to purchase half of its location, thereby exceeding the power given him by the resolution passed at the meeting of the 20th September. I opposed the contract at the time, and all and every measure that tended towards the company's making a purchase of any new location. I also heard a letter read, written by Hickok to George C. Bates. I censured him for so doing, on the ground that he had no right to write such a letter without conferring with the trustees. As a trustee and stockholder, I disapproved of the letter. All the other members present took the same ground, except Mr. Roberts, who was president of the meeting. I believe he did not express an opinion on the matter."

If Galloway, when he says Knapp made the purchase "as the matter was understood in the office of the company," intends to be understood as asserting that the company approved of what Knapp had done, he is mistaken, as clearly appears from the testimony recited, as well as that of other witnesses to which I might refer.

Knapp left Detroit for Lake Superior soon after making the contract with Bates, to take possession of the Ontonagon location. He proceeded as far as the Sault, and then, for reasons which it is not necessary here to state, returned to the city of New York to see Hickok. In speaking of his interview with Hickok at this time, he says: "Mr. Hickok informed me that there was a general difficulty existing in the company; that the difficulty had increased since I was there, and they had refused to ratify the contract which I had made with Mr. Bates. I did not know what to do then. I talked with Mr. Hickok considerably on the subject, and told him, as I

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had before, that I had a good deal of confidence in the location, and wanted to secure an interest in it, and wanted he should. I did the best I could to induce Mr. Hickok individually to go into the purchase. I had learned from him that the Vulcan Company had flared up. He thought favorably of doing it, but did not give an answer directly; said he would look at it, and see what could be done. I understood from him that he had talked with some of his business firm, and he finally said that he would go into it."

Knapp thereupon returned to Detroit, and consummated the agreement with Bates by taking a conveyance from the Ontonagon Company to Hickok. He was authorized to do so by Hickok, who furnished him with means to pay the purchase money.

At an annual meeting of the stockholders of the Vulcan Company, on the 6th of December, thereafter, the following preamble and resolutions were adopted:

"*Whereas*, The trustees of this company have reported to this meeting the fact of Mr. Knapp's having left their location and ceased his mining operations thereon; therefore,

"*Resolved*, 1st. That the meeting do not consider it expedient to resume their mining operations at present.

"2d. That Mr. Knapp be requested to furnish the company forthwith with his accounts fully made up to the date of his leaving said location, together with a statement of all balances due to workmen, &c., up to the same period, and an exact inventory of the property and effects of all kinds belonging to said company."

The evidence referred to, with other evidence bearing on the same points, it seems to me, establishes beyond dispute the following facts: 1st, That Knapp was not authorized by the Vulcan Company to make the purchase. 2d, That with a knowledge of the existence of the contract, the company refused to ratify it. And, 3d, That after the

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company had refused to ratify the contract, and not before, the purchase was made by Hickok, with more or less expectation, probably, on his part, that it would subsequently be taken off of his hands by the company.

Notwithstanding the resolution of the 20th of September, authorizing Knapp to make inquiries only, Hickok instructed him to make a bargain with Bates for the purchase of the location. And Knapp took possession of it, after its conveyance to Hickok, with the men under him in the employ of the Vulcan Company, and commenced and for several months continued to work it — giving them and others to understand it had been purchased by the Vulcan Company. It also appears, from the evidence before us, that complainant had reason to believe, from Hickok's letters and the statements of Knapp, that the purchase was made for the Vulcan Company. In answer to such and other like acts of Hickok and Knapp, or either of them, it is only necessary to say that they were wholly unauthorized; that they were not the acts of the Vulcan Company, or of its authorized agent, but the individual acts of Hickok or Knapp. Whatever effect, although unauthorized, might be given to them in a controversy growing out of them between the Vulcan Company and a third person, none whatever could be given to them in a suit by the Vulcan Company against the Minnesota Joint Stock Company. It must be borne in mind it is that view of the case I am now discussing, and that, for that purpose only, I take it for granted the same relief could be had against the Minnesota corporation as against the Minnesota Joint Stock Company. The Baltimore Company has not, and does not claim, any other right in the Ontonagon location, than what it is entitled to by reason of the eight hundred shares of stock it owns in the Vulcan Company. Its claim is based on the rights of a stockholder of the Vulcan Company; and if the Vulcan Company has no rights, its stockholders have none. The Vulcan] Company might have

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ratified the contract made with Bates, but this it refused to do at the time, and there is no evidence before us that it was ever ratified. Having absolutely refused to ratify it at the time, it could not subsequently ratify it to the prejudice of intervening rights. Much less would it be allowed to show such ratification by proof of the subsequent unauthorized acts of its agents.

Our attention was particularly called on the argument to the following language in the preamble to the articles of the Minnesota Association, viz: "The undersigned, parties to this instrument, having purchased through Wm. Hickok," &c, ; and to the deed from Hickok to the company, which, after reciting the conveyance to him by the Ontonagon Company, states: "And whereas, the undersigned made and held such purchase for himself and the other persons who have formed an association called the Minnesota Mining Company of New York; and whereas, articles of association have been signed," &c.

While the parties to these instruments and those claiming under them would, in a proper case, be estopped from denying the truth of these statements — although from the evidence before us they do not appear to be true in fact — I am at a loss to perceive their bearing in the present controversy. They contain no recognition of a purchase by, or in trust for, the Vulcan Company; and there is not anything in the articles of association of that company, or in the nature of its business, to prevent, expressly or by implication of law, its members forming other associations for mining, or holding stock in as many different mining companies as they might think proper. And this being the case, Hickok or any other member of the Vulcan Company had a right to purchase the Ontonagon location in his own right. To suppose, therefore, that what took place at the meetings of the Vulcan Company on the 20th of September and 13th of October was intended, and was shaped with a view, to pave the way for such in-

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dividual purchase, or for the subsequent formation of a new company, or for the purpose of thereafter changing the name of the existing company, would imply simulation without any motive, not in one or two persons, but in a majority of those present at these meetings. It seems almost absurd to accuse Hickok and Knapp of acting a false part at the meeting of the 20th of September; and here, if anywhere, the supposed inquity must have commenced. For they, and they alone, were in possession of all that was then known in regard to the Ontonagon location; and they communicated all they knew about it to the meeting, and urged its purchase by the Vulcan Company. And they were then, and still are, stockholders in the Baltimore Company. How far a knowledge of this last fact may have influenced the action of those who were opposed to the purchase, we do not know. All we know in regard to it is, that the purchase was opposed by some for the reason that the Baltimore Company would have an interest in it without paying any part of the purchase money. At the second meeting—the one held on the 13th of October—Knapp was not present, but Hickok was, and his conduct on that occasion was consistent with the part he took in the first meeting. He was still in favor of the purchase; and notwithstanding the reprimand he then received for writing to Bates as he did, he appears afterwards to have cherished a hope the company would yet make the purchase. On the 6th of December thereafter the Company resolved to discontinue mining, and it was not until the 6th of June following that the Minnesota Joint Stock Company was formed.

There is another important fact that should not be overlooked. When the purchase was made of the Ontonagon Company the location was not what it is now. It has derived its importance and value from what has transpired since. Its value at that time was speculative, and the low price at which it was purchased, $1,600, shows

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the estimate placed on it for mining by the Ontonagon Company. It had been partially explored by that company, but the exploration had not been carried so far as to determine its ultimate value for mining. It has since proved to be one of the best mining locations in the Lake Superior country. It is this that gives the present suit the magnitude and importance so justly attributed to it by the parties. When the acts of men are impugned as not truthful, the magnitude of the benefit or advantage to be derived from them is a circumstance always to be taken into consideration, with other evidence, in determining the truth or falsity of the acts themselves. But it must be the magnitude of the benefit at the time the acts were done. Like a ticket in a lottery, the value of the ticket before the lottery is drawn, and not after the ticket has drawn a prize. Apply this principle to the meetings of the Vulcan Company of the 20th of September, the 13th of October, and the 6th of December, and how very small was the motive for making the acts of those meetings speak a falsehood. If there is anything false, it is not in the records of the meetings, but in the acts themselves.

The Vulcan Company was formed for mining on the location purchased of the Baltimore Company, and our attention was called to the following words in the articles of the company: "Or on other lands in said district that may be leased, located or bought by this association for mining purposes." These words, as I understand them, do not make it obligatory on the company, on the Baltimore location proving worthless for mining, to purchase or lease other locations. Besides, there is nothing in the agreement between the Baltimore Company and Hickok and others, of the 21st November, requiring the company to be formed in pursuance of it to assume such an obligation.

The decree of the court below, I think, should be affirmed.

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MARTIN Ch. J., dissenting:

Objections to the bill were raised before us, and appear to have been made at the hearing below, also, for want of proper parties as complainants, and as defendants. I regard with disfavor an objection dilatory in its nature, which is not raised preliminarily by demurrer to the bill, but is suggested after the cause is put at issue, and the parties (as in the present case) have been put to the enormous expense of taking proofs, and preparing the cause for a hearing upon the merits; and with the more especial disfavor when such objection is not even pointed out in the answer. There is no equity in allowing a cause to pass off upon such grounds, thereby putting the complainant to the trouble and expense of instituting new proceedings, either alone or with others, and of re-taking testimony which has already been submitted to the court, upon which a decree upon the merits can be pronounced. Especially is there no equity in such a course in this case, where the merits were the foundation of the decree appealed from, and the question of a want of parties was only incidentally alluded to — so that the appeal is, in fact, from a decree dismissing the bill upon the merits.

The objections which I shall notice are, for a want of the Baltimore Mining Company as complainant, and of the Vulcan Mining Company as co-defendant: as that of the want of Hickok, and the stockholders of the different companies, will be necessarily disposed of by the view I take of these objections.

And first, as to that of the want of the Baltimore Company as co-complainant.

On the 21st of November, 1846, Titus, as president and agent of such company, agreed to sell to Hickok & Co., and their associates, two locations of such company, numbered 267 and 269. For these locations they were to pay $4,500 on the proper assignment to them, or to the trustees of a company to be formed by them, of the leases of

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such locations; and were to deliver to Titus proper certificates of one-fifth of the entire interest therein, and of the capital stock of a company to be formed for mining thereon, to be forever unassessable, and to be delivered to the shareholders of the Baltimore Company; and a company for mining purposes was to be formed in New York on the basis of such locations; the articles of association of which should embrace, among its fundamental provisions, one for the division of its stock into 4,000 shares, of which 1,000 should be unassessable, and 800 of these should belong to the shareholders of the Baltimore, and the remaining 200 to the new company.

Two days after, the leases of these locations appear to have been assigned to Hickok for the benefit of the contemplated company; and at that time, and undoubtedly as a part of the transaction, Hickok, as such assignee, executed to Titus, as a supplement to the articles of the 21st, an instrument which is as follows: "As a part of the consideration for the sale and transfer of leases Nos. 267 and 269 of mineral lands, by the Baltimore Mining Company to William Hickok, I do hereby agree and promise that, on the formation of a mining company on said leased lands, 800 shares of unassessable stock shall be issued to the president of the Baltimore Mining Company; to be endorsed by him and distributed among the shareholders of the Baltimore Mining Company, *pro rata* to their number of shares; said unassessable shares to be numbered from 1 to 800 both inclusive; [said new company to be organized, and the stock issued, within sixty days from date."

Accordingly we find that on the 30th of the same month, the Vulcan Mining Company was organized, by articles of association dated and signed upon that day, in which these agreements with the complainant are fully recognized, and provision made for their execution.

The contract therefore is, in my opinion, to be ascer-

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tained from a construction of the instruments of November 21st and 23d as one. I do not regard that of the 21st as having been materially altered by the supplement executed on the 23d; as by the former the certificates were to be delivered to Titus to be delivered to the shareholders of the Baltimore Company, while by the latter they were to be issued to Titus, to be endorsed by him, and distributed to such shareholders. The proper construction of either is substantially the same, viz: that such shares should be transferred through the medium of Titus, as receiver and distributer.

The first agreement was made with Hickok and his associates; but as the assignment was made to Hickok individually, this supplemental agreement was taken from him, for the evident purpose of securing the performance of the first. At any rate, the transfer of the leases to Hickok, in execution of the agreement of the 21st, was a sufficient consideration, if any was required, for his undertaking.

But what is more significant, the defendant does not question, in the answer, the validity of either instrument, but asserts the agreement in terms almost precisely the same as those employed in that of Hickok as assignee of the leases. The language of the answer is as follows: "And the defendant, further answering, admits that it was contemplated that the interest of the new company, proposed to be formed, should be divided into 4,000 shares of stock, and that said Hickok and others, as a part of the consideration of said assignment of said leases, agreed to and with the complainant, as president of the Baltimore Mining Company, that on the formation of said proposed new company, 800 shares of unassessable stock in the same, to be numbered from 1 to 800 inclusive, should be issued to the president of the Baltimore Mining Company, to be endorsed by him, and distributed among the shareholders of said company; and that said new company

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should be organized, and stock should be issued, within sixty days after the date of said agreement." The defendant also alleges that such company, viz: the Vulcan, was accordingly organized; that the stock was divided into shares as contemplated, and that 800 unassessable shares were to be alloted and transferred to the Baltimore Company; and further that the Vulcan Company has ever been ready to perform such agreement, and, after the perpetration of the frauds complained of in this bill, actually made out certificates according to the terms of such agreement, which are now ready for delivery.

Thus it appears that the defendant does not seek to repudiate this agreement of the 23d of November, and I see no good reason, in morals or equity, why we should volunteer to do so for it, even if it differed substantially from the first.

Now, by either, or both instruments, Titus was made the intervening party between the two companies, and, as such, was authorized to demand the certificates of stock for distribution. The Vulcan Company is bound to recognize him as such, for it is bound to execute the agreement under which it acquired the title to the locations 267 and 269, and which had been fully recognized in its articles of association; and it can not question his right to demand that the certificates of stock should be issued to him, as its agreement is executed by issuing such certificates, in such form as he shall require. It is not concerned in any thing beyond this; the distribution of such stock alone concerns Titus and the members of the Baltimore Co., and the Vulcan Co. must be content to fulfil its engagements without asserting, to excuse the non-performance of its contract, the rights of another with which it has no concern, and by which it can not be affected, if such contract be executed in either form.

Titus, then, was regarded by the Vulcan Company at its organization, and is so recognized by the defendant, as

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the person to whom the certificates of stock were to be issued, and it was the clear duty of such company to issue them to him. With their ultimate destination it had no concern, and the insertion in the articles of the purposes for which he would receive them, was merely declaratory of the relation of Titus to his company, and neither conferred right, nor imposed obligation upon the Vulcan Company.

The complainant is, then, the trustee of the Baltimore Company, for the purpose of receiving and transferring the certificates of stock, and for demanding them, if not delivered according to the agreement; and so the Vulcan Company evidently regarded him; and such is the substantial admission of the defendant in the answer. It is this demand which he makes by his bill.

Such being the case, Titus, as such trustee, had the right to file this bill without making the Baltimore Company, or its stockholders, parties, upon the well settled rule of pleading in equity, that if the mere object of the suit is to get into the hands of the trustee the property which is to be enjoyed by the *cestuis que trust*, the latter need not be made parties: — (See *Calvert on Parties* 8, 212, 213). In this state this rule has been repeatedly recognized. Thus, in *Sill v. Ketchum*, *Harr. Ch.* 423, it was held that *cestuis que trust* are not necessary parties when the only object of the suit is to reduce the property into possession; and *Cook v. Russell*, *Ibid.* 443, is to the same effect. In *Morey v. Forsyth*, *Walk. Ch.* 467, the Chancellor held that, where it is no part of the object of the bill to affect the existence of the trust, or the trust property, except to place it in the hands of the trustee, who can not, until then, execute the trust, it is not necessary to make the *cestuis que trust* parties. The same rule is recognized by Curtis J. in *Hall v. The Sullivan R. R. Co.*, cited in 21 *Law Rep.* 138, and in *Shaw v. The Norfolk R. R. Co.*, 5. *Gray* 162. In this latter case the objection

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for want of parties was taken by demurrer to the bill, and was very ably discussed at the bar; many of the same arguments being urged which counsel have urged before us in the present case. But the court overruled the demurrer, holding that, in a suit by a trustee, when the different interests involved in the suit may be fairly and fully represented and tried without joining all the parties interested, a strict adherence to the general rule is not required, and that the *cestuis que trust* need not be joined with the complainant when he asserts no adverse claims to them, but on the contrary seeks, as their representative, to enforce the trusts created for their benefit, and in which they all have a common interest.

The true rule in this class of cases is, in my judgment, that it is sufficient that the court has before it the person or persons who are full representatives of the parties beneficially interested in the subject of the suit; and that in all cases, and especially in those where the objection is not taken by demurrer, but in the answer, or at the hearing, if the court can make a decree which will dispose of the rights of the parties before it, without injuriously affecting those of others not parties, it will do so; but if not, and the objection be not taken preliminarily by demurrer, it will direct the cause to stand over that new parties may be added. I know of no other rule under which substantial justice can be done.

It is further objected that the bill is fatally defective in not making the Vulcan Mining Company a party defendant. If such were the case, I should not, for the reasons already stated, dismiss this bill, but order the cause to stand over until such company could be brought in. But I do not regard this objection as tenable. The theory of the bill is that such company is already a party; the defendant being the Vulcan Company in fact, but acting under a new name: and it would not only have been inconsistent, but absurd, in the complainant, under this theory, to have framed his

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bill differently in this particular. The defendant alleges that the Minnesota and Vulcan companies are not identical, and this is the great question to be determined in the case; as the complainant can only have relief upon establishing such identity.

In my view, all necessary parties are before the court.

The remaining question is, whether, upon the case made, the complainant is entitled to have from the defendant the relief prayed. The solution of this question depends upon that of two others: 1st. By whom was the one-half of location 98 purchased from the Ontonagon Company? and 2d. What is the Minnesota Company?

From a careful consideration of all the evidence, I entertain no doubt but that the purchase was made by and for the Vulcan Company. To my mind, the internal evidence, afforded by unquestioned facts, that such is the case, is overwhelming; while the testimony of the witnesses, conflicting as it may appear, may and can be reconciled upon this hypothesis, and upon no other. Now, those who associated as the Vulcan Mining Company had full knowledge of the terms of the purchase from the complainant, and consequently that he, and those he represented, would have a one-fifth interest in all the stock of said company. With this knowledge they organized for the purpose of prosecuting mining operations, not only upon the locations purchased from him, but also upon any other lands which the company might lease, locate or buy, for mining purposes. Under this organization, the 800 shares of unassessable stock were set apart, in the articles of association, to be transferred to the complainant; and the necessary effect in equity of this appropriation of shares, as well as the undoubted intention of the company, was to confer upon him, and his *cestuis que trust*, the one-fifth interest in all its operations, upon any and all locations it might acquire. Operations were commenced upon the locations first purchased, but no success followed, and the project of procuring one

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or more other locations was agitated, as will appear from facts to which I will presently advert.

It must now be borne in mind that Knapp was the agent of the Vulcan Company in conducting its operations; and that Hickok, as treasurer, and owner and representative of the majority of the stock, was the active director and correspondent at New York.

In July, 1847, Knapp received instructions to visit and examine the Algonquin mine, with a view to its purchase. He went, and upon his return examined the Ontonagon location, and ascertained that it was the most valuable, and a desirable purchase. Finding that it could be procured at a comparatively low rate, he started for New York to report, and to recommend its purchase. When he reached Detroit, he made some inquiries respecting the probable chances and terms of its sale, and visited the complainant at Jackson, laid the matter before him, told him of his purpose and object in going to New York, and induced him to accompany him to Detroit, introduce him to Bates, and assist in negotiating with him respecting such purchase. All this being done, and having obtained the desired information, he repaired to New York, and laid the matter before the Vulcan Company. This was about the 20th of September, and the records of the proceedings of the company at a meeting on that day, as well as the testimony of Hickok, Barry, Pearsall, Smith, and Knapp himself, are relied upon by this defendant as evidence that the purchase which he subsequently made, was not authorized by the company, nor made by or for it. These records show only that he was instructed to make inquiries as to the possibility of purchasing the whole, or a part, of the Ontonagon location No. 98, and to communicate the result. But this record, I am satisfied, as every one reading the testimony must be, does not contain a full history of the proceedings, nor give a correct impression of what was done. At this time the Vulcan

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Company unquestionably contemplated making the purchase, if practicable, but whether of the whole, or of a part, and whether alone, or in association with the Baltimore Company, was a question of serious difficulty; as Knapp had informed the meeting that he had proposed to the complainant that each company should buy one-half; but, as the evidence shows, Hickok said that "it would be better to keep in with the complainant, as he would be of great service in effecting the purchase." This advice of Hickok was evidently acted upon, and Knapp was instructed to conduct the negociation in such manner as not to arouse the suspicions of Titus; to secure his aid, and finally purchase the one-half of the location for the Vulcan Company, refusing, when all was ripe, to allow the Baltimore any connection in it as a joint purchaser. This, from a careful examination of all the testimony, I have no doubt, was the first scheme of fraud, to be followed subsequently by another.

Now Galloway, who acted as Secretary *pro tem.* of that meeting, and ought to be presumed to have understood what was done, testifies clearly and understandingly that Knapp was authorized by the company to make the purchase, and that he did so, as the matter was understood in the office of the company, and as he himself understood it: That Knapp went up to Detroit for the purpose of purchasing the one-half of the location, and did purchase it from Bates: That after the conclusion of the matter, some of the Vulcan Company did not want to have Titus have anything to do with it, and that it was talked about changing the matter *after it was concluded*, but that Hickok thought the best way would be to undo that bargain, and have the matter taken out in his own name — that is, have the lease assigned to him, and he would turn it over to the parties of the Vulcan — and it was so done, as he, Galloway, understood. Thence, he says, sprung the Minnesota Company.

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By the parties to the Vulcan Company was evidently intended the holders of the assessable shares; and, as neither Titus nor the Baltimore Company were parties by subscription to the articles of association, and the stock agreed to be transferred to him had been withheld, neither he nor the Baltimore Company were considered to be parties in the company within Hickok's scheme. He further says, that the rights of the Vulcan Company were claimed the same as in the Minnesota; and it was agreed and understood that the parties in the Vulcan had the same rights in the Minnesota. My limits will not permit me to quote more largely from his testimony, but the irresistible conclusion to be drawn from it is, that the purchase was made by the Vulcan Company, and that, by an arrangement subsequently made among "the parties to the Vulcan," as they were styled, the assignment of the lease was taken to Hickok for the use and benefit of such parties, and for the purpose of excluding Titus and his *cestuis que trust* from participation in the benefits of the purchase. Galloway was not, and could not, have been mistaken in this, and he is strongly corroborated by the testimony of Knapp and others, and by the facts surrounding the purchase itself.

Now there is, and can be, no doubt but that Knapp negotiated with Bates as the agent of the Vulcan Company, and, as he himself understood, with ample power to purchase. This appears from his own testimony and that of Bates, as well as of Galloway and others. He procured the assistance of Titus, giving him to understand that he was acting by authority of the Vulcan Company, and that Titus was interested, at least as the representative of the 800 shares, in promoting the purchase. Titus never doubted this; nor did Knapp, until his interests and those of the other witnesses for the defendant, demanded another construction to be placed upon the transaction. Knapp, in his testimony, says that neither himself

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nor the complainant liked the shape of the instructions which were given to him about the purchase of location 98, and that he and Titus wanted the contract from Bates to run to the Vulcan and Baltimore Companies, but that he told Titus *he must abide by his instructions.* What those instructions were we have already learned from Galloway; and his testimony, and that alone, explains this of Knapp, which is inexplicable without it. It was to secure Titus' aid through his interest in the Vulcan, and yet exclude the Baltimore Company from joining in the purchase.

Knapp says, that after the price was agreed upon, a memorandum of the agreement was drawn up and signed by Bates on the part of the Ontonagon, and by himself *on the part of the Vulcan Company.* He speaks of this afterwards as the *first* contract, implying that another was subsequently made. In speaking of an interview with Conger (who, as a member of the Baltimore Company, assisted him, together with Titus, in the negotiations with Bates), in which interview it appears that Conger was desirous that the Baltimore Company should be permitted to join in the purchase, he says: "I think I told Conger that it did not correspond with my instructions *from the Vulcan Company*, and that I must abide by my instructions."

We now come to the *second*, or what the defendant claims to have been the real, contract.

After this first contract was made and forwarded to the company, Knapp went to the Sault St. Marie's with supplies for the company; and then, upon advice, as he says, returned to New York, to see that the bargain was all closed up with the Ontonagon. When he reached New York, he says, he was informed by Hickok that a general difficulty existed in the company, which had increased since he was there in September, and the members had refused to ratify the contract made with Bates. He says

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he did not know what to do then, (but what the dilemma was, knowing as he did their ultimate designs, he does not inform us), but he says that he finally persuaded Hickok to purchase in his own name, and it was so done. This is precisely the consummation to be looked for if Galloway's testimony is true, and we have here the machinery laid bare by which the complainant was kept quiet, and his aid secured so long as needed, and then the pretended repudiation of the contract, that the purchase might be ostensibly made by Hickok.

Now, after this interview in New York, in which Hickok was persuaded, and, as he would have us believe, reluctantly persuaded, to make this purchase in his own name, Knapp returns to Detroit, and has an interview with Conger, and he says that "Conger very strongly objected to the way in which the papers were to be made out, and seemed very much displeased with the way they were to be executed. He said that, in the way the papers were to be executed, it just cut off the Vulcan and Baltimore Companies entirely. I told him that I was satisfied that it would all be right, and that the Vulcan Company would finally have the purchase. I told him" (and here is the key to the transaction), "that if the Baltimore Company would pay their proportion — their *pro rata* of the eight hundred shares which they had in the Vulcan Company — that such company would take the location off Mr. Hickok's hands:" in other words, as I read this testimony by the light of the well established facts in the case, the Vulcan Company purchased through Hickok, but with the intention of so holding the location as to cut off those entitled to have the eight hundred shares from participation in it, unless they would contribute towards such purchase — a condition directly repugnant to the contract and articles of association under which such shares were acquired.

Now, there was not only a meeting of the stockholders on the 20th of September, but one of the trustees on the

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21st, to which I shall hereafter more fully allude. Of what transpired at this latter meeting we have no direct information, but Knapp, who was present at both, evidently knew all, and his statements to Conger have great significance in consequence. He knew both the nature and extent of his powers, conferred at either the one or the other meeting, and he also knew, and his testimony shows, that the understanding was that the Vulcan Company was and should be the actual purchaser of the one-half of 98: that it should never be the private adventure of Hickok, or of any person except their own association. The knowledge of these facts enabled him to say to Conger that he was satisfied that it would be all right, and that the Vulcan Company would finally have the purchase; for he well knew that it was made for it.

There is another important fact which characterizes this purchase. Titus not only assisted Knapp in making such purchase, but he was the drawer of one, and the endorser of the other of the drafts given in payment; thus rendering that valuable service which Hickok suggested, at the meeting of the 20th of September, he might afford, and which the company expected he would.

I can not reasonably suppose that the complainant would have done this, had not the purchase been made by the Vulcan; nor can I appreciate the reasoning which maintains that, after this aid, the company can equitably deny his right to participation in the purchase, or that of his *cestuis que trust*. All the facts attending the transaction show that he was acting for such company in assisting Knapp, and in lending his credit to effect the purchase, and that it was by the procuration of its agent that he so acted; and the company ought not to be suffered, upon any technical pretext, to deny in a court of equity the validity of the purchase thus made, nor to escape the responsibility to him, and those he represents, growing out of it.

But this is not all. While Knapp was in New York,

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although it had been assertained that operations, if continued upon the locations 267 and 269, would be useless and fruitless, the company voted to continue mining operations during the ensuing winter. This is inexplicable if the company did not design to purchase location 98 from the Ontonagon; as Knapp tells us that he informed the company that these locations were worthless, and that further operations upon them would only result in a squandering of money. We know too much of the members of the company to believe they would pursue such a course; and we accordingly find that Knapp, as soon as the purchase from the Ontonagon Company was made, removed the men and supplies of the Vulcan Company from these locations on to the new purchase, and there carried on operations in its name until the next summer. There is no direct evidence that the company knew that he had abandoned the old and was operating upon the new location, until some time in the spring of 1848; but no one can doubt that it was known and contemplated that he would abandon it for operations upon the newly acquired location, if the purchase from the Ontonagon should be made; and it is evident from the proceedings of the meeting of the 6th of December that his doings were then known. The resolutions of that meeting, that the company would cease operations for the present, and calling upon Knapp for an account, have no effect upon my mind, in the light of the facts already adverted to, to establish either that the Vulcan Company had not authorized his course, or that it had been repudiated.

Cash, who acted at location 98 in behalf of the Ontonagon Company, distinctly states that it was put into the possession of the Vulcan Company; that notes were given in the name of the Vulcan Company to men who had claims against the Ontonagon Company, to induce them to abandon opposition to the transfer, and that he had an account with the Vulcan for supplies, &c., furnished in the spring, and

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not with the Minnesota Company, until in the summer of 1848. Knapp also, during all this time, made contracts in the name of the Vulcan Company, relating to the working of the mine upon such location, and gave notes in its name, and drafts upon it; and we have no evidence that they were ever repudiated by it. Even as late as the 18th of April, 1848, Knapp, as agent of the Vulcan Company, informed Bates that on examination the *Vulcan Mining Company* had selected the north half of location No. 98 as its choice between the two halves; and all this occurred after the pretended individual purchase by Hickok, with all the particulars of which Knapp was fully conversant. Can there remain any reasonable doubt, upon all these facts, as to what party purchased this location?

But we are referred to the testimony of certain persons who afterwards associated in forming the Minnesota Company, and in diverting this purchase from the uses originally contemplated, to show that Galloway is mistaken, and that the Vulcan Company never made such purchase.

I will hastily glance at the testimony of some of these witnesses. And first at Hickok's. I regret exceedingly that the limits of an opinion will not suffer me to place his testimony and that of Galloway in juxtaposition. In almost every particular they are variant. Hickok is positive that the Vulcan Company did not purchase from the Ontonagon; Galloway is equally positive that it did. Hickok is remarkably clear and distinct in his recollection of the proceedings of the Vulcan Company at the meeting of the 13th of October (to which I shall again allude): Galloway, who was secretary of the meeting, knows nothing of the facts Hickok so minutely details. Galloway's testimony squares with all the ascertained facts of the case; Hickok's with none, except those which promoted the fraud he was active in perpetrating.

The first contract was made by Knapp somewhere between the 20th of September and the 1st of October. On

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the 21st of September, the day after the meeting at which the defendant claims that all the authority was given to Knapp which he ever received, and the day on which the trustees of the company held a meeting, to which I shall presently allude, Hickok, in the name of Hickok & Co., wrote to Titus that Knapp had a "kind of *carte blanche*" from the company to operate as he should "deem would best serve the interests of the stockholders," and that the matter in regard to the purchase of this location had been left with him, to make, if possible, his negotiations in Detroit. He states further, that the Vulcan Company had the fullest confidence in Knapp's operations. On the 12th of October, Hickok writes an official letter as treasurer of the Vulcan Company, to Bates, in which he says "Knapp was duly authorized to make any purchase for the Vulcan Company that he deemed best for their interest, and in the purchase of one-half of the Ontonagon location, the trustees approved his course," &c. "When I forward the certificate of deposit," he says: "I will also send a special power of attorney, for you to have executed by the trustees of your company, for you to convey to the *Vulcan Mining Company* the one-half of said location." This is the letter which, he says, was so bitterly condemned by the company on the 13th, and yet the minutes of this meeting of the company (upon the silence of whose record so much reliance is placed by the defendant at other times) is totally silent upon this subject, except to state that communications were presented from Knapp, its agent, and Bates and Titus, which were directed to be entered on file, and the meeting adjourned. Certainly we could hardly draw an inference of disapproval or of repudiation from this entry.

On the 30th of October, he writes to Titus that he thinks Knapp's course (in making the purchase, without doubt) a very prudent one, and of the highest importance to *the compgny*, and he then makes him a proposition for

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the swindling of both the Baltimore and Vulcan Companies, in which he recognizes the complainant's interest in the purchase. It is as follows, "I have the following proposition to submit to you, which can be carried out, and with the same benefit to you and to our firm. It is this It shall be represented by others that your company has abandoned its location, which you can credit. I will make the same representations here, and manage to buy up all the stock. During this time, however, your company can be at work on such part as Mr. Knapp will set aside for it, on the Ontonagon location. You and I will arrange the preliminaries with regard to a part of location purchased from the Ontonagon Company. You can then submit the proposition agreed upon, and I will put it through for you. I think this plan will be as advantageous for your company, and such a course would be more satisfactory to the members of our company, so long as they did not know the object, which of course they could not."

Now, did Hickok believe when he wrote this letter, that the members of the Vulcan Company, at the meeting on the 13th, had so severely censured his letter to Bates of the 12th, and had then repudiated the purchase? or what did he mean when he tells Titus he can submit the proposition agreed upon, and he will put it through for him? If the Vulcan Company had repudiated Knapp's acts in the purchase, and it was to be made by him in his own right, as the defendant would have us believe, I am at a loss to know to whom Titus' proposition could be made, or with whom Hickok would put it through, except himself; or who was to be satisfied except himself. To my mind this letter establishes the fact, that his purchase was in behalf of the company, and excludes his testimony from any claim to consideration, as contradictory to that of Galloway.

Mr. Barry does not regard the proceedings of the meeting of the 20th of September as having conferred any au-

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thority upon Knapp to purchase for the company; but quite the contrary; and he regards the purchase as having been made by Hickok on his own account. That he is truthful I do not doubt, and so is Galloway; but he evidently mistakes the discussion of the members for the action of the company. But Barry was absent from the meeting of the 13th of October, and this fact renders his testimony of comparatively little value, when weighed against that of Galloway and Knapp, as well as against every fact attending the purchase, and the course pursued by Knapp at the time, and long subsequent to the purchase.

So far as he, Pearsall and Smith, are concerned, they are clearly mistaken, both when they say that Knapp was not authorized to purchase, and that Hickok purchased on his individual account. I have, I trust, already sufficiently shown that they must be mistaken as to Knapp's authority; and as to the purchase by Hickok, of which they speak in equally positive terms, they are contradicted by his and their own deliberate admissions, as well as by the whole internal evidence of the case. Now, Hickok in his assignment of the lease of 98 to the defendant, among whose members were Barry, Pearsall, Smith and Knapp, expressly admits that he did not purchase for himself—his language being, "and whereas the undersigned made and held such purchase as trustee for himself and the persons who have formed an association," &c.—and these witnesses, in the articles of association of the Minnesota Mining Company, over their own signatures, admit as follows: "The undersigned, parties to this instrument, having purchased *through* Wm. Hickok," &c., the property in question. Of whatever little value this evidence may be for other purposes, it shows the understanding of the defendant's witnesses of the character of Hickok's purchase, and fortifies, to the fullest extent, Galloway's testimony. There is evidently something of the meeting of the 20th of September suppressed, or what is perhaps more probable, forgotten by them. But however this

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may be, there was another meeting, to which I have already alluded, the proceedings of which are not given to us, except by the general minutes of the company, kept as in other instances — (Titus could not, and the defendants have not given them) — which might explain and clear up the whole matter. The trustees were authorized by the articles of association to make this purchase. They had a meeting on the 21st of September, at which Knapp was present, and it is not impossible that the instructions and authority to him, of which he speaks to Titus, Conger and Bates, were then fully given to him. That he had such, and acted upon them, can not be questioned; and Hickok's letter to Titus respecting Knapp's authority, in which he says he has *carte blanche*, &c., to which I have already alluded, was written upon that day, and evidently after some meeting at which authority of some kind had been conferred upon Knapp. Galloway may have confounded, in his recollection, the proceedings of the two meetings; and this fact may enable us to reconcile much of the apparent conflict of testimony.

Be this as it may, I have no doubt, from all the evidence, that the purchase of the one-half of location No. 98 was made by the Vulcan Company, and that everything done thereafter, and until the organization of the Minnesota Company, was for the purpose of keeping the complainant and the other shareholders of the Baltimore Company, entitled to have the one-fifth interest, from sharing in its benefits. Had the speculation turned out worthless, I have no idea we should ever have heard of this defense.

Although the Minnesota Company may now comprise many members who were never in the original company, yet it is, in fact, so far as this location and this complainant are concerned, the Vulcan Company; and it would be a disgrace to equity if it could not tear off so flimsy a covering for fraud as overspreads this transaction, or that substance and facts should be sacrificed by it to a name.

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The defendant, to avoid the consequences of this construction of the purchase, insists upon various strange, and in my judgment, inequitable defenses. Among others, that the Vulcan Company is still alive, having an independent existence, and ready to perform its contract with the complainant. This may be; but except as it lives in the Minnesota, no galvanic power can endow it with motion.

It is also insisted that, under its articles of association, the Vulcan Company had no right to make the purchase. If the Minnesota Company is not the Vulcan, it has no interest in litigating this question; nor can the existence or non-existence of such right affect it. But if it be the same, a defense which is fraudulent in its very character, one by which a portion of the association, asserting and insisting upon the validity of the purchase as to themselves, deny its validity for the purpose of defeating the asserted claims of others to participation in it, should be spurned from a court of equity.

It is further insisted that, by the conditions of the purchase from the Baltimore Company, the association to be formed, and in which the complainant was to have the interest of 800 shares, was to be formed upon the basis of the locations so purchased; and that if the Vulcan Company extended its operations beyond, the Baltimore might be excluded therefrom, as no consideration moved from the latter except so far as operations upon the locations sold by it are involved. As already remarked, this defendant, unless it be the Vulcan in fact, has no interest in, nor can it litigate, this question. If otherwise, the answer is, that it can not be permitted to repudiate its own deliberate engagements. The locations purchased from the Baltimore Company were the basis, it is true, of its organization; but by no means the limits of its operations. When the Vulcan Company framed its articles of association, it was with this understanding, and with a full knowledge and understanding of its obligation under the con-

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tract with Titus. This was to assign to him the one-fifth interest in its stock, as a part of the consideration for the purchase of locations No. 267 and 269. This stock would confer upon its holders rights co-extensive with the operations of the company. The company was obligated to embrace such locations within the field of its operations, but was by no means to be restricted to them. By the articles of association, provision was made for extending them if found desirable; and I apprehend if such had been done by the unquestioned purchase, by the company directly, of this location 98, and the works had been extended over it, and no Minnesota Company had been formed, no one would claim that the eight hundred shares of stock, if they had been transferred, would not have entitled Titus and those he represents to a full participation in all the benefits of such purchase, and this upon the ground that, under the contract, and the articles, they would be unqualifiedly entitled to it. It is the fraud of the defendant that obscures this question. The contract with Titus was, not that he should have 800 shares of stock which would entitle the holders to such proportionate rights and benefits as might result from mining upon these locations; but it was that he should have those shares of the stock of the company, unqualified by any limitations, whether its operations should be circumscribed by the limits of these locations, or expanded over others which might be procured. In relation to this interest, Titus and the Baltimore Company do not stand as purchasers, seeking to enforce the specific performance of a contract, but as vendors from whom the whole consideration has passed. No consideration moved from Titus as a purchaser of the stock, as that was a part of the compensation to be paid for the locations he sold; and this one-fifth interest in all the operations of the company, was as essential a portion of such consideration as was the $4,500 of cash. It was, I admit, as to this, an adventure,

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in which all embarked with full understanding of the risks and perils to be encountered; but I can not understand by what course of reasoning equity can allow the success of such adventure to justify the repudiation of the obligation which was created as a part of the adventure itself.

But, if the fact were otherwise, and the consideration moved from the complainant, yet upon every equitable principle, if the purchase was made by the Vulcan Company, he is entitled to his stock, and the full benefits it will, by the articles and the company's operations, confer. I confess that I can not understand the reasoning, even upon this assumption, by which the proposition is sought to be maintained, that one who enters into an association or co-partnership upon an originally equal footing with its other members (as every holder of those 800 shares would), must pay additional consideration if he would participate in its expanded operations, and such as are within the scope of the original articles under which he so enters. But the defendant in the answer does not set up any such defense, but denying its identity with the Vulcan, is yet willing to deliver the stock. I know no good reason why it should not be taken at its word.

It is also claimed that the members of the Vulcan Company had a perfect right to form an independant association, for the purpose of conducting mining operations upon such land as they might acquire, or to unite with other associations. It is unnecessary, nor am I disposed, to deny this proposition. But a portion of them have no right to take a portion of the common property, and appropriate it to their own use, in derogation of the rights of others. The Vulcan Company need not have included in its articles a provision for extending its operations to other locations than those purchased from the complainant, or it might have stricken out such provision; but so long as it remained, it was binding; and the purchases made under it enured to the

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common benefit of all its stockholders, and of those to whom it had contracted to convey stock; and could not be diverted by a part. If the Vulcan Company had not bought this one-half of location 98, no question of the right of this defendant, or of its members, could arise; but when, as I think is clearly proven, it was purchased by the company, none of its members less than the whole, no matter what name or new organization they may assume, can appropriate it to individual purposes, or deprive their associates of participation in the benefits growing out of it. It is further claimed that, although had the company made this purchase with its own funds the complainant would have an equitable as well as legal right to participation in it, yet as it was paid for by Hickok, no such equity or right exists in him. If such purchase was made by and for the Vulcan Company, the fact that Hickok advanced the payment for such company, can have no effect to deprive a portion of the members of the company of their rights in common with all, nor to enable such company to deprive one already entitled to stock, of such stock. If the advance was made by Hickok for the company, it was still a payment by the company, so far as the rights of the members, as between themselves, and those of Titus, as against it, are concerned; and, although Hickok may have a claim against the company for such advance, yet one portion of its members can not exclude another portion, whether stockholders in fact or by contract, from a participation in the purchase upon that ground. Titus himself drew and endorsed the paper which was given to Bates upon the purchase. Had he, instead of Hickok, taken it up, and he and his friends appropriated the property, as Hickok and his friends have in the present case, I apprehend that quite another view would be taken of this question by those who would then be the defrauded members of the company. But it may be said, Hickok also had the title; but the answer is in his own words, he "made and held such purchase

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as trustee," and he could assert no such rights as against his *cestuis que trust*, whom I find to be the Vulcan Company. I can conceive of no rights which a portion of the company can assert against others, growing out of the fact of the advance of the payment by Hickok; and no equities existing in favor of one portion who have not paid, against another portion in the same dilemma.

I think the decree of the court below should be reversed, and a decree rendered for the complainant.

CHRISTIANCY J.:

I express no decided opinion in this case as to the sufficiency of the bill on the question of parties complainant, though I am inclined to think it defective in this respect, and have no doubt it is so as to parties defendant.

But I shall not go into the question of parties at all; since, if all proper parties were before the court, yet, upon the merits, as exhibited by the pleadings and proofs, I am wholly unable to discover any equity on the part of complainant or his associates, the Baltimore Company, which can authorize him or them to call for relief in a court of chancery. Upon the merits, therefore, I concur in the result with my brother Manning, and generally in the views he has expressed upon the evidence, and the reasoning he has adopted, so far as it extends. I shall therefore confine myself to a few plain principles, which I think exercise a controlling influence upon the case, and shall avoid all matters of detail.

The bill is in the nature of a bill for the specific performance of a contract; it is an appeal to the sound discretion of the court, and to be sustained, if at all, upon the broad principles of equity. It is not a case in which the court is compelled, by the force of an iron rule, contrary to its sense of justice, to aid in enforcing a wrong, under the name and guise of a judicial proceeding. And

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whatever may be the technical legal rights of the complainant, if his claim should be found unconscionable — if the facts of the case are not such as to create any moral obligation on the part of the defendant, and the relief asked would violate rather than secure the just rights and real equities of the parties — relief should be denied.

If the complainant (and I use his name as including and representing the Baltimore Company) has any equitable right to the eight hundred shares of stock, claimed from the Minnesota Company, that right must be based upon some consideration. The only consideration, upon which all his equities rest, was the transfer to Hickok and his associates (afterwards constituting the Vulcan Company) of the Baltimore leases or locations, No. 267 and 269; and the claim rests exclusively upon the agreement with Titus (or the Baltimore Company) for the formation of a mining company, "*on the basis of these locations*," and for the issue to the Baltimore Company of the unassessable stock in the company so to be formed.

The consideration which the complainant's company received, for the transfer of these locations, was four thousand five hundred dollars in cash, and the agreement for the eight hundred shares of stock to be based upon these locations. And the only consideration which Hickok and his associates received, for the four thousand five hundred dollars paid by them, and for their stipulation to issue the stock, was the transfer of these locations to them. The eight hundred shares of stock were to be unassessable; and of course complainant's company were not to be called on to contribute to the expense of mining operations by the company to be formed; but the whole of that expense was to be borne by the other four-fifths of the stock. This was upon the ground that the excess in the value of these locations, beyond the four thousand five hundred dollars, was considered an equivalent for the amount to be contributed by eight hundred shares of stock,

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in the prosecution of mining operations by the company, for the whole time the company should continue in business. This was the amount put at risk by complainant and his associates in the common enterprise; and the four thousand five hundred dollars paid by Hickok and his associates, together with all the expenditures to be made in the prosecution of the contemplated mining operations, was the amount to be put at risk by the latter in the same enterprise. These risks were connected with and undertaken on the faith of these locations alone, and all parties looked to the profits to be made from mining upon *these locations* only, for reimbursement. None of the parties, by this agreement, contemplated the formation of a company for mining in any other place, nor that the stock to be issued to complainant and his associates was to rest upon any other basis. To this extent, and to this only, Titus and associates had paid a consideration or equivalent for the exemption from assessment on the eight hundred shares of stock they were to receive; and the obligation entered into by Hickok and his associates, was exactly co-extensive with this consideration. There was no consideration, nor any stipulation for stock, which was to rest upon the basis of mining elsewhere, or which contemplated the purchase of other locations.

But Hickok and his associates, the Vulcan Company, in framing their articles of association, went beyond the obligations of their contract with complainant; and, after declaring the purposes of the company to be the prosecution of mining operations upon these locations, add the words, "or any other lands in said mineral district that may be leased, located or bought by the association for mining purposes," — thus providing for the case of a purchase of other locations not contemplated by the agreement with complainant.

Neither Titus nor any of his associates signed these articles, though he individually, by the original agreement,

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had agreed to take one hundred shares in the company to be formed.

Now, so far as these articles went beyond the original contract, and provided for the purchase of, or for mining upon, "any other lands," &c., they were without consideration, purely voluntary, and created no obligation on the part of Hickok and his associates, the Vulcan Company, to Titus and associates. The latter were no parties to this additional provision, were not bound by it, and could not claim to bind the Vulcan Company by it.

The Vulcan Company were at liberty the next day, or the next year, to strike out this provision from the articles, and Titus and his associates could have no right to complain.

If the Vulcan Company should attempt to divert any of the company funds to the purchase of a new location, the Baltimore Company might, by reason of their interest in that common fund, restrain them from so doing, and confine their operations to the scope of their contract. But, if the Vulcan Company had already so appropriated the common fund, the Baltimore Company might probably either call for an account and repayment of the fund so misapplied, or elect to ratify the act, and take their shares in the new adventure in which it was invested.

But I think it entirely clear, upon the evidence, that no part of the company funds was ever diverted to the purposes supposed; and, as I shall more particularly notice hereafter, at the time when the Ontonagon location was purchased, the Vulcan Company had no common fund in which the Baltimore Company could have any interest whatever.

There was nothing in the nature of the contract with complainant, nor in the relations created by the articles of association, to prevent the individual stockholders from becoming stockholders in any other joint stock company for mining purposes. These stockholders, or any of them, had

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a perfect right, at any time they saw fit, to form a new company, and to take shares in it exactly in proportion to their shares in the Vulcan Company, or in any other proportions. In forming such company, they had a right to choose their own associates; and any such stockholders in the Vulcan Company who might choose to form a new company, and to purchase a new location, were under no obligation to inform their other associates of their intention, nor to give them the chance to share in the new adventure. In this respect, I think the law is not so stringent as applied to stock companies as it is to partnerships under ordinary articles of co-partnership. Stock passes, and is intended to pass, from hand to hand in the market; and there is a change in the membership as often as the stock changes hands. There is no implied obligation or duty to refrain from entering into any other adventure of a similar character, with other associates. At all events, even upon the score of strict partnership, the stockholders of the Vulcan Company who might see fit to purchase a new location with their own individual means, and without using any common fund in which the Baltimore Company had an interest, could be under no obligation to admit the Baltimore Company on any *better terms* than those on which they had been admitted to participate in the stock of the Vulcan Company to be based upon the Baltimore locations. For their unassessable stock, based upon *these locations*, they had contributed what was deemed and agreed upon at the time, to be their just proportion or equivalent; and if they sought to participate in this new location, and to hold stock based upon it, it should be upon the terms of paying their proportion to this also. But neither the bill nor the evidence makes any such case; nor is the claim of the complainant and his associates based upon any such ground. They do not ask, nor, so far as it appears, were they ever willing to participate in the purchase on such terms, or to put

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a dollar at risk on the faith of it. But they seek to participate in the chances of profit, without the hazard of loss, and without paying or offering to pay a dollar.

The process of reasoning by which this claim is sought to be supported, when analyzed and reduced to plain English, is this: "Titus and his associates were allowed to participate in the Vulcan Company, and to hold unassessable shares in its stock based upon the Baltimore locations, because they had paid for this privilege by the conveyance of these locations to the company; therefore they have the right to participate in the profits of the Ontonagon location, bought with the money of others, and to hold unassessable stock based upon it, without the payment of any consideration or equivalent whatever." And this claim, standing upon this basis, is gravely termed an equity; and the refusal of those who have paid their own money for the Ontonagon location, to recognize this claim, and their various excuses, pretences and efforts to avoid its recognition, have been as gravely denominated a fraud. But, before these refusals, these excuses, and pretences, however false, can entitle the complainant to any relief on the ground of fraud, it must appear that the acts complained of as a fraud affected, or were calculated to affect, injuriously, some *right* of the complainant or his associates. If the stockholders of the Vulcan Company had a right to do directly, openly, and in defiance of the Baltimore Company, what it is claimed they have done indirectly, then the false pretences and subterfuges to which it is claimed they have resorted to conceal their design until accomplished, and to avoid the hostility of the Baltimore Company — though a moral wrong — would constitute no wrong of which the Baltimore Company have a right to complain, nor give that company any equities they did not before possess. Thus — for illustration — if I promise to make you a gift of a horse, this promise creates no obligation which law or equity will enforce; and I am at

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liberty to refuse without giving any reason or excuse whatever. But, if I choose to give a false reason, or to resort to falsehood to induce you to believe I still intend to give you the horse, when I do not, will this convert my void promise into a valid contract, and give you any greater right to enforce your claim, based upon no consideration, when you had lost nothing by the falsehood, and had no right which could be affected by it?

The equities of Titus and his associates were co-extensive with their contract, with the consideration they had paid, and were confined to stock in a company formed for mining upon the particular locations they had conveyed to Hickok and associates. The value of the stock they were to receive under the contract would depend entirely upon the value of these locations for mining purposes — for it is not pretended that the leases on which they were held were of any value whatever for any other purpose. At the time the contract was entered into, these locations or leases upon which the contract and the interests of all parties under the contract were based, were considered of great value. If they should prove so in fact, both parties to the contract would participate in the benefit; if they should prove to be worthless, both would lose the amount they had expended or put at hazard.

What then was the value of these locations, when the purchase of the Ontonagon location was made? The whole evidence in the case shows that it had been ascertained to be nothing, and worse than nothing; a mere source of expenditure without a hope of return. This is so clear that is is not controverted; and the complainant's claim is based in some measure upon this very fact. Under such circumstances, were the Vulcan Company under any obligation to continue mining operations upon it, and to waste money to no purpose? Clearly not, and it is equally clear they were under no obligation to purchase another location; and if they chose to cease all further operations, no court of equity

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would compel them to proceed. Had they even chosen to disband and allow the company to be dissolved, the Baltimore Company would have had no right to complain. The value of the Baltimore Company's interest, then, under their contract, and the value of the consideration they had given, had been ascertained to be nothing. Possibly, if the Vulcan Company had actually dissolved, the Baltimore Company might have been entitled to their proportionate share of the surplus of assets after the payment of all debts. But the evidence clearly shows there was no such surplus; that the assets were not sufficient to pay the debts, but that these were paid by an assessment upon the stockholders.

The whole and the only enterprise contemplated or embraced by the agreement with complainant and his associates, that agreement itself, the consideration for it, the obligations growing out of it, and the equities founded upon it, must, I think, in a court of equity, be looked upon as having failed, and become extinct, and all the equitable obligations of the Vulcan Company to the complainant and his associates, as fully satisfied. The adventure had terminated, and all parties had lost what they had put at hazard.

Under these circumstances, if a new location was to be purchased by the Vulcan Company, and mining operations to be prosecuted upon it, it would be an entirely new adventure, one not contemplated by the agreement with the Baltimore Company, and to which they had contributed nothing; and there being no funds or assets of the Vulcan Company with which to make the purchase or prosecute the work, the fund for that purpose must come from the contributions of the individual stockholders; and upon principles of equity and fair dealing, the Baltimore Campany, if they would participate in the advantages of the enterprise, should contribute their *pro rata* to the expense; for as yet they had contributed nothing to it, nor even contracted for any participation in it.

Admitting, then, that, under these circumstances, the

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Vulcan Company had, without any contribution from the Baltimore Company, purchased the Ontonagon location with funds contributed by all the assessable stockholders in proportion to their stock, and the conveyance had been taken directly to the company — which is more than the evidence shows or is claimed to show — whatever might be the strict legal rights of the Baltimore Company, or whatever claim they might have if the stock had already been issued to them — when they come into a court of equity, and ask a decree for the issue of stock which is to entitle them to participate in the profits of the new location, they must submit to the rule that he who asks equity must do equity: and this would require them to aver and prove a readiness and willingness to contribute their share of the burden. Had the Baltimore Company actually obtained the stock before the new purchase was made, they might, perhaps, as matter of strict technical law, be entitled to the advantage thus gratuitously and improvidently bestowed, though it would be grossly unjust and unconscionable to insist upon it. But when compelled to seek the aid of a court of equity to obtain the stock, that court should refuse to aid in the enforcement of so unconscionable a claim, and leave the parties to such remedy as they might be able to obtain upon their contract in a court of law.

Had it been distinctly admitted by the defendant that the purchase was made by Hickok upon a full understanding and agreement with all those who subsequently formed the Minnesota Company, that he should purchase it in trust for the company so to be formed, each individually paying him their respective shares — and this is all it is claimed the evidence *tends* to show, and much more than I think it does show — still I am entirely unable to discover any ground, under the circumstances of this case, upon which the Baltimore Company could object, or claim a benefit from the purchase. But it seems to be supposed that because Titus aided Hickok by his friendly offices

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(for he paid nothing) in the purchase of the Ontonagon location, with the belief that it would ultimately be taken by the Vulcan Company,' these services are to be considered as a good consideration for an obligation on the part of the Minnesota Company, who took the location off the hands of Hickok, to give to complainant's company the eight hundred shares of stock. And this is certainly the only consideration shown for complainant's claim. Let us see whether this reasoning is sound.

That Titus and his company would have been greatly benefited by having the Vulcan Company make the purchase in such a manner as to let in this claim for unassessable stock, may be readily believed; as it would be so much clear gain to the complainant's company, without expense or risk. And that Hickok and Knapp were also anxious for such an arrangement is clearly shown by the evidence: they also held stock in the same Baltimore Company, Hickok being a large stockholder. The interests of Hickok, Knapp, and complainant were identical, and they acted in concert. If they could induce the Vulcan stockholders into such an arrangement, it would make the Baltimore stockholders permanent pensioners upon the Vulcan Company, and enable them "to reap where they had not sown." But all the Vulcan stockholders did not own stock in the Baltimore Company, (though a few others owned nominal amounts). To those not thus interested, or but nominally interested, such an arrangement would be grossly unjust. Still, if they chose to enter into it voluntarily, with their eyes open, all very well. But such an exhibition of disinterested benevolence was hardly to be expected in the stock market; and, it may be added, hardly to be demanded as a *right* elsewhere. The most conscientious men might be expected to object to such an arrangement as unequal, requiring them constantly to pay without receiving, while the other parties were to receive without paying.

Still Titus, Hickok and Knapp, had a right to make the

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effort, and to use all fair means of persuasion to induce the recognition of even such a claim. But the Vulcan stockholders had, at least, an equal right to refuse.

The attempt was made. Titus, Hickok and Knapp labored zealously and in concert to effect their joint object; but, as ought to have been anticipated, the Vulcan stockholders, the moment they saw the object, took the alarm, and protested. Hickok, however, still believing his influence with the Company would enable him to obtain their consent, still persists, and undertakes to accept the proposition of Bates, for the sale of the Ontonagon location, in the name of the Company, without authority of the Company to do so. They repudiate his acts. He then, having confidence in the location, makes the purchase with his own money, and takes the conveyance in his own name, evidently still in the hope, in which Titus and Knapp also share, that the company will eventually take it off his hands in such manner as to subject it to the claims of the Baltimore Company. But the Vulcan stockholders still obstinately refuse, as any man capable of managing his own affairs would be likely to refuse, to go into an adventure upon such a basis: most of them, however, did ultimately consent to take an interest in this purchase, and, with Hickok, to form a new company on the basis of it, as I think they had a perfect right to do.

Whatever efforts Titus may have made in this matter, were made for his own interest, and that of his company; not for the stockholders of the Vulcan Company, who subsequently formed the Minnesota Company. He had spent some time, and labored faithfully, in the attempt to induce the Vulcan Company to purchase the Ontonagon location, and to bestow one-fifth of it gratuitously upon the Baltimore Company. Having failed in this attempt, shall the court now decree him that same fifth as a compensation for his time and services in soliciting the gift? If Titus could have any claim for such services, it would be against those for whom he performed them, and for what his services were worth.

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If he had been about to purchase this Ontonagon location for the Baltimore Company, and had been induced to forego the purchase by the representation of the Vulcan Company or its agents, that the purchase was intended for the Vulcan Company, so as to let in the claim of the Baltimore Company for stock, the case might have presented a different aspect. But nothing of this kind is pretended.

The merits of this case, were, I think, fully met and ably presented by the Judge who tried this cause in the court below, and his decree dismissing the bill must be affirmed.

CAMPBELL J., did not sit, having been counsel for one of the parties.

William S. Maynard v. Thomas J. Hoskins and others.

An indorsement upon an appeal bond in Chancery, signed by the proper officer, in the following words:—"I approve of this bond, both in form and substance," will be held an approval both of the sureties and of the penal sum; and is sufficient.

On a motion to dismiss the appeal for want of a sufficient bond, affidavits will not be received to enlarge or restrict the force of such an endorsement.

Heard May 22nd. Decided May 24th.

Motion to dismiss an appeal in chancery, for the insufficiency of the appeal bond. There was nothing upon the bond, or in the transcript returned, to show that, previous to the execution of the bond, the amount of the penalty had been fixed by a Circuit Judge or circuit court commissioner; and the approval endorsed upon it, which was signed by the circuit court commissioner, was in the following words: "I approve of this bond, both in form and substance."

H. J. Beakes, and *C. I. Walker*, for the motion, con-

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tended that here was neither a fixing of the penalty of the bond, nor an approval of the sureties, as required by the statute. This approval, by its very terms, is confined to the form of the bond — to the sufficiency of the terms in which the obligation is expressed. It does not relate at all to the sufficiency of the sureties, and might have been endorsed before the bond was signed as properly as afterwards. They cited 4 *Paige* 457, 454; 11 *Paige* 156; 2 *Hoff. Ch. Pr.* 27; 2 *Barb. Ch. Pr.* 402.

O. Hawkins and *G. V. N. Lothrop*, contra, while insisting upon the sufficiency of the bond, offered affidavits to show the responsibility of the sureties, and that the commissioner was satisfied with them when he endorsed his approval, and also that the Circuit Judge orally directed what should be the penalty of the bond before this was given. These affidavits were objected to, and if the court received them, the appellee offered to read affidavits in opposition.

THE CHIEF JUSTICE:

From inspection of the bond, and the endorsement of the circuit court commissioner upon it of his approval, we are satisfied that there has been a substantial compliance with the statute.

The statute prescribes that, within the forty days allowed for claiming and entering an appeal, the appellant shall file with the register who entered the decree appealed from, a bond to the appellee, with sufficient sureties, to be approved by the commissioner, or a judge of the circuit court, and in such sum as such commissioner or judge shall direct, conditioned, &c. A proper bond was filed within the prescribed time, and the commissioner's endorsement upon it of his approval, in the absence of any statutory requirement of a special endorsement, is evidence of a full compliance on the part of the appellant with the requirements of law. Appeals are to be favored, rather

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than discouraged; and no technical nicety, in construing the acts of others than the appellant, should be permitted to defeat his rights. The bond having been presented to the commissioner for his approval, he must be presumed to have known his duty, and in endorsing an approval, to have intended to discharge all his duties, viz: that of approval of the sureties, and of the penal sum; which latter would be tantamount to a direction of the amount. It is true that were a bond presented to an attorney for his opinion as to its sufficiency in form and substance, he would regard only the body of the instrument, and not inquire as to the sufficiency of the sum, or the ability of the sureties, for the reason that such would not legitimately fall within his professional cognizance. But when such bond is presented to an officer having certain duties respecting it prescribed by law, and he approves it, either in general words, or such as are used in this case, such approval should, upon every principle of equity and right, be presumed to have been made with full understanding of his duties, and held to embrace every thing within his jurisdiction. The language of this endorsement was evidently meant to include all this, and not as qualifying such approval. The motion is denied.

We disregard entirely the affidavits presented, as not proper on this motion.

Charles Jackson v. The People.

Error will not lie on a conviction in the Recorder's Court of Detroit for an offense against a city ordinance.

Decided May 26th.

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John A. Page v. David B. Webster and another.

A tenant in common of lands can acquire no title to the interest of his co-tenant, by bidding in the lands at a sale of the whole for delinquent taxes.

A bill in chancery for partition of lands held in common, set forth that defendant had purchased the lands at sales for taxes, which purchases were claimed to be void; and discovery was prayed with respect thereto, and that the same, be declared void: — *Held*, that the bill was not multifarious.

The executors and devisees of a deceased tenant in common, not asking partition among themselves, may jointly file a bill in chancery to have their interests in the land set off from that of the co-tenant.

A bill for partition by executor and devisees set forth, that the undivided interest was devised to the latter in common, with the power, nevertheless, in the executor to sell and dispose of the same: — *Held*, a sufficient statement of the respective interests of complainants, who asked no partition as between themselves.

Heard April 27th. Decided May 29th.

Questions reserved from Montcalm Circuit in chancery, where Canso Crane, one of the defendants, had interposed a demurrer to the bill of complaint, for multifariousness. The case is sufficiently stated in the opinion.

A. & E. Gould, for defendant Crane, to the point that the validity of his adverse claim could not be tested in a suit for partition, cited, 3 *Johns. Ch.* 302; 4 *Ibid.* 271; 1 *Ibid.* 111; 5 *Barb.* 62; 3 *Paige* 242; 5 *Denio.* 385; 2 *Barb. Ch. Pr.* 285.

J. W. Longyear, for complainant, on the question of multifariousness, referred to 1 *Dan. Ch. Pr.* 384 *and note*, 385; 1 *Hoff.* 290; 13 *Ill.* 95, 107; 6 *Dana*, 374; *Story Eq. Pl.* §§ 271, 530 *and note*, 539.

MARTIN CH. J.:

This bill is filed for partition of real estate held by the complainants and defendants as tenants in common. As to Webster, who is described as being the owner of an undivided one-fourth, the bill is taken as confessed. Crane is represented as the owner of another undivided one-fourth, and the bill further alleges that he has a pretended title which he claims to hold as adverse to that of his co-tenants, but which is averred to be fraudulent and void;

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and they ask to have it so declared in order that partition of the several interests of the owners may be made. The facts respecting this title are set out in the bill substantially as follows: The whole of the lands owned in common was sold at tax sales, for non-payment of taxes assessed thereon during the continuance of the tenancy in common; and upon such sales, the defendant Crane, being such co-tenant, bid off the same for the taxes of certain years, and for those of other years caused the land to be bid off by his brother, but for his own use, and, as the bill alleges, he took a transfer of the bids, and procured deeds from the Auditor General to be executed therefor to himself. Reed, in his life time, offered to pay Crane his proportion of such bids, and the interest, &c., and the complainants, who are his executor and devisees, are still ready and now offer to do so; but they also insist that such sales were invalid for irregularities, and that Crane's title is a cloud upon theirs which ought to be removed.

This, Crane contends, is an assertion and admission of an adverse title and claim in himself, which can not be litigated in this suit; but that the validity of his title this acquired should be first determined at law, and if found to be invalid, then this suit can be maintained.

It is unnecessary to determine whether, on a bill for partition between tenants in common, adverse titles or claims can be litigated and settled; because, if the allegations of this bill are true—and the demurrer admits their truth—Crane has no adverse title or claim. He occupies neither the position of one purchasing in an outstanding adverse title, nor of one purchasing from a *bona fide* purchaser at a tax sale, whose title had become absolute, whereby the co-tenancy had been dissolved. He stands simply as one who has paid upon compulsion taxes assessed against the property held by him in common with others.

The burden was cast upon him and his co-tenants to

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pay the taxes assessed against the land. This each might have discharged, so far as his own interest was concerned, by paying his aliquot proportion of the tax; and thus relieved such interest from the lien for the tax which the law imposed upon it. Had Crane done this, and afterwards bid in his co-tenants' interest sold for their default, perhaps a different rule might obtain, and he have acquired a good title as against them: but such is not this case, and no opinion is called for upon such a state of facts. But as they all neglected to discharge this burden, and as the coercive measure of a sale of the land was resorted to by the state to compel it, when Crane bid in, or procured another to bid in the land for him, and took the deeds to himself, he acquired thereby no title as against his co-tenants, as this was but another way of discharging such burden. He was in default himself; and his default, as well as that of the other cotenants, occasioned the sale; and he can not be permitted to take advantage of his own neglect of duty, to acquire the title of others. So far as this suit is concerned, therefore, he stands in the precise situation in which he would, had he voluntarily paid the whole amount of taxes before sale. He has no title, but simply a right to compel contribution from his co-tenants; and the bill is not multifarious for averring the facts, the character of the purchase, and his adverse claims founded upon it; nor for praying relief against them in aid of the partition. — See *Lewis v. Robinson*, 10 *Watts*, 354; *Williams v. Gray*, 3 *Greenl.* 207; *Van Horne v. Fonday*, 5 *Johns. Ch.* 407.

Such being the rule, both of law and equity, complainants are entitled to the discovery sought; for if Crane's title be of the character charged in the bill, the court may and ought to declare it void, and no impediment in the way of making partition between these parties: — See *Overton v. Woolfolk*, 6 *Dana*, 374.

The interests of the several complainants are set forth

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with sufficient particularity. The statute (*Comp. L.* §4619) requires that the bill shall set forth the rights and titles of all persons interested in the land, so far as the same are known to the complainant. These complainants proceed jointly as the executor and devisees of Hezekiah H. Reed, for a partition between the estate and these defendants. They ask no partition as between themselves. So far as the executor is concerned, he represents the whole title, and the devisees unite with him as interested in the subject matter, and submitting to be bound by the decree. This they may do, as indeed may all representatives of a single interest: — See *Hill. on Real Property*, 606.

The objection of the defendant Crane appears to be, that the interest of each complainant is not set out with sufficient particularity, and that the bill does not show in what proportions the complainants take under the will of Reed, nor in what manner Page has an interest in the land, nor how much that interest is. The bill avers that Hezekiah H. Reed, in his life time, was seized of the undivided one-half of the lands in question, and while so seized, died, leaving his last will and testament, whereby, among other things, Page was nominated his executor, and the land was devised in common to the other complainants, with the power nevertheless in such executor to sell and dispose of the same. There is no ambiguity in this statement of the interests of the several complainants, which, with the exception of that of Page, would necessarily be share and share alike; and Page's interest is stated with sufficient clearness as that of an executor with power to sell and dispose of the whole interest which the testator had in the land. I can perceive no necessity in any case for greater particularity; nor are we referred to any authorities or any principle of pleading requiring it. Sufficient is stated to enable the court to take the necessary proofs of the interests of the several parties, upon which to decree a partition; and especially in this case, where the complainants seek no partition as between themselves.

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Let it be certified to the Circuit Court for the county of Montcalm, as the opinion of this court, that, upon the points reserved, the demurrer should be overruled.

The other Justices concurred.

Maurice Hickey and another v. David M. Hinsdale.

The entry of a judgment in the docket of a Justice of the Peace is *evidence* of the judgment, but is not the judgment itself.

The statute requiring a Justice of the Peace to keep a docket, and to enter therein the judgments rendered by him, is directory only.

After judgment pronounced, and before the proceedings are entered in the docket, it is competent to prove the judgment by the oath of the Justice, who produces his minutes of the trial, which are as full and complete as the entry on the docket is required to be.

Heard May 3d and 4th. Decided May 30th.

Error to Wayne Circuit.

The action was by Hinsdale against plaintiffs in error, in replevin. The defendants (below) justified under execution against the plaintiff, issued upon a judgment rendered by Garry Spencer, a justice of the peace. To prove this judgment, they introduced the justice, who testified "that he, as such justice, rendered a judgment against David M. Hinsdale, as garnishee of Samuel Chamberlain, in favor of John R. McBride, John Robinson and John M. Hoover, on March 1st, 1858, and entered the same on a half-sheet of foolscap paper, which was not a part or parcel of his docket; that he kept a docket, but that said judgment, among a large number of other judgments, had not been entered upon his docket: that owing to the press of business, he had omitted to transcribe his judgments into his docket: that he had his original minutes, including the judgment in the case of McBride, Robinson and Hoover against Hinsdale garni-

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shee of Chamberlain, of which he had spoken, in court, which he produced and identified as follows to wit:

"John R. McBride, John Robinson and John M. Hoover, *vs* David M. Hinsdale, Garnishee of Samuel Chamberlain, *Defendant.*

In Justices Court, Wayne Co., ss. Before Garry Spencer, Justice of the Peace, In Garnishee.

January 29th, 1858. On filing affidavit of J. E. Bigelow, Esq., attorney and agent for plaintiff, a garnishee issued returnable Feb. 8th, at 2 P. M.: summons returned personally served and fees paid January 30th.

Feb. 8th, at 2 P. M., case called: garnishee in court, and after being duly sworn by me, to true answers make to all questions put to him touching any indebtedness to the defendant Samuel Chamberlain, on the 30th day of January last, as also any property, money or effects in his hands or in his possession belonging to said defendant, deposes and says that at the time of the service of said garnishee on the 30th of January last, he was indebted to said defendant in the sum of from $300 to $500; had no property or effects in his hands or possession belonging to said defendant, and further sayeth not. And, therefore, this case is continued until the final determination of the suit between plaintiffs and defendant. And, whereas, on the 24th day of February, A. D. 1858, a judgment was rendered by and before me in the original suit of the above named plaintiffs against the above named defendant, Samuel Chamberlain, in favor of said plaintiffs, and against said defendant, for the sum of $242 54 damages, and $3 45 costs of suit; and, therefore, upon the request of J. E. Bigelow, Esq., attorney for plaintiffs, I, the said justice, on the 24th day of February aforesaid, did issue a summons against David M. Hinsdale, the above named garnishee, therein commanding him to appear before me,

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at my office, in the city of Detroit and county of Wayne, on the first day of March next, at 2 o'clock in the afternoon, then and there to show cause why judgment should not be rendered against him as garnishee of Samuel Chamberlain, the defendant in the original cause; which summons on or before the return day thereof was delivered to me by Joel Bostwick, Jr., a constable in and for the city of Detroit, with a return thereon signed by him that the same was personally served on the said garnishee on the 25th day of February then inst.

March 1st, 1858, at 2 o'clock P. M. case called. Plaintiffs in court by J. E. Bigelow, Esq., their attorney, and declared against defendant (garnishee) in assumpsit for money had and received, and claim damages for the sum of $245 99. And defendant (garnishee) did not appear, and therefore it is taken as confessed that the said defendant (garnishee) has no cause to show why a judgment should not be rendered against him as garnishee to the said Samuel Chamberlain, the defendant in the original suit, and in favor of the said plaintiffs. Whereupon plaintiffs proceeded to the trial and proofs of their said claim. And plaintiffs now offer in evidence the judgment rendered by and before Garry Spencer, a justice of the peace in and for the city of Detroit, on the 24th day of February, 1858, for $242 54 damages, and $3 45 costs, and also the evidence in the answers of the garnishee in this suit. Plaintiffs rest their case. And, after hearing the proofs and allegations of plaintiffs, it is considered and adjudged that the plaintiffs are entitled to recover from the said garnishee the sum of $245 99, as damages, besides the costs of this suit; and judgment is therefore hereby rendered in favor of said plaintiffs, and against the said garnishee, for the sum of two hundred and forty-five dollars and ninety-nine cents, as damages, and three dollars and fifty-nine cents, costs of this suit, as taxed by me, March 1st, 1858.

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Damages, ...	$245 99
Costs, ...	3 59
Ex.	25

Garry Spencer,
Justice of the Peace.

By order of attorney for plaintiffs, execution issued March 8, 1858, and delivered to Joel Bostwick, Jr.: execution returned May 8th, 1858, wholly unsatisfied. February 23d, 1859, by order of attorney for plaintiffs, alias execution issued and delivered to Maurice Hickey, deputy constable. Execution returned March 28th, 1859, wholly unsatisfied."

These minutes, together with the files in the garnishee suit, and the files and judgment in the suit against Chamberlain, mentioned in the minutes, defendants offered in evidence in connection with the testimony of the justice, to prove the judgment under which they justified; but the court excluded the same, and plaintiff had judgment.

J. E. Bigelow, for plaintiffs in error:

The entry of a judgment on the docket is not the judgment itself: — 3 *Bl. Com.* 395, 396; 1 *Bouv. Inst.* 264. The statute directing the keeping of such a docket is only directory: — 6 *Hill*, 38; 2 *Fairf.* 377. A statute is directory when the thing required is not of the essence of the principal thing to be done, but intended to promote method, system and uniformity: — 7 *Barb.* 138; 21 *Pick.* 64; 1 *Hill*, 130. This law is not repugnant to, but perfectly consistent with, the existence of the common law proof.

The evidence offered was the best that existed, and therefore admissible. The minutes of the justice are always admissible when the record has not been made up: — 18 *Pick.* 464; 13 *Johns.* 430; 6 *Vt.* 541; 1 *Greenl. Ev.* §513; 2 *Mich.* 372; 1 *Mich.* 227; 3 *Mich.* 233. Or the judgment may be proved by parol: — 3 *B. & C.* 449.

W. C. Hoyt, for defendant in error:

No judgment is rendered until entered on the docket:

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5 *Hill*, 60; 19 *Wend.* 371; *Tiffany*, 269; 3 *Mich.* 208; 1 *Doug. Mich.* 502. Especially if there is an attempt to enforce it, it must be first entered:—3 *Hill*, 47; 1 *Wend.* 486; 19 *Wend.* 371.

The statute has provided a mode of proving justice's judgments, and there is no other mode known to the law. The provision is copied from that of New York. Formerly in New York a justice was not required to keep a docket, but could keep minutes which were evidence when properly proven:—3 *Johns.* 429; 10 *Wend.* 525; 11 *Wend.* 636; 5 *Johns.* 351; 11 *Johns.* 166; 13 *Johns.* 430; 6 *Barb.* 626; 1 *Cow.* 115; 5 *Hill*, 431; 15 *Wend.* 397.

If justice's judgments are to be regarded as records, there must be proof of the existence of the record before secondary evidence can be admitted:—3 *Mich.* 207; 1 *Doug. Mich.* 502; 1 *Greenl. Ev.* § 513; 1 *Stark. Ev.* 193; 5 *Mich.* 349.

MANNING J.:

The case presents two questions: 1st. Can a justice's judgment have a legal existence without an entry or record of it on his docket? and 2d. If it can, was the evidence offered to prove the judgment admissible?

By § 3890 of Compiled Laws, every justice of the peace is required to keep a docket, and to enter therein the title of all causes commenced before him, the time when the first and subsequent process was issued against the defendant, and the particular process issued; the judgment rendered by the justice, and the time of rendering the same, the time of issuing execution, and the name of the officer to whom delivered. The section is divided into fifteen subdivisions, only four of which we have stated, each subdivision requiring certain things when they occur in the progress of the case, to be entered on the docket.

The statute further provides (§ 3784) that in cases where a plaintiff shall be nonsuited, discontinue or withdraw his

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action, and where a judgment shall be confessed, and in all cases where a verdict shall be rendered, or the defendant shall be in custody at the time of hearing the cause, the justice shall forthwith render judgment, and enter the same in his docket; in all other cases he shall render judgment and enter the same in his docket within four days after the cause shall have been submitted to him for his final decision.

Is the statute as to the entry of the judgment in the docket mandatory, or is it directory merely? If the former, then there can be no judgment without the entry of it in the docket. If the latter, then the judgment may have a legal entity although it is not entered on the docket. There is always more or less difficulty in construing a statute to be directory only. The object of the statute and the effect a different construction would have on some prior act or right not necessarily connected with, or forming a part of the thing to be effected by the statute, should always be taken into account in deciding the question, as the best and only means in the power of the court of arriving at the intention of the Legislature.

The entry in the docket is evidence of the judgment, but not the judgment itself. One is a judicial, the other a ministerial or clerical act. They are as separate and distinct from each other in a justice's court as in this court, where the judgment is pronounced by the court, and the record is afterwards made up by its clerk from minutes taken by him at the time. We see no good reason why the same may not be done in a justice's court, unless it is prohibited by the statute. The object of the statute, most probably, was to provide for a more perfect record, and to give greater security to justice's judgments, by requiring an entry of the proceedings and judgment in each cause to be made in a book called the docket. The statute makes a transcript from the docket, certified by the justice, evidence of the judgment, and of all prior and subsequent

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proceedings in the cause, required to be there entered. Was not this the sole object of the statute? Or must each and all of the proceedings required to be entered on the docket be proved by the docket? and if not entered there, through inadvertence or otherwise, be held void and of no effect? Few justice's judgments, it is to be feared, would stand so severe a test; and we are unwilling, unless compelled to do so, to give a construction to the statute that will put the rights of suitors in so much peril from the ignorance or negligence of the justice. The proceedings in justice's courts have ever been regarded with the greatest indulgence, and it is not to be presumed the Legislature intended to prescribe a more rigid rule to be observed by justices in rendering judgment, than obtains in courts of record. The statute does not make the docket the only evidence of a judgment, either in terms or by necessary implication. On the contrary it expressly provides that the proceedings in any cause or matter, had before a justice, may also be proved by the oath of the justice (§ 3894). By the words "may also be proved," must be understood some other proof than the docket. Like provisions in a statute of the state of New York have been held by the courts of that state to be directory only:— *Hall v. Tuttle*, 6 *Hill*, 38; *Sibley v. Howard*, 3 *Denio*, 72; *Walrod v. Shuler*, 2 *Comst.* 134.

When the judgment is entered in the docket, it can not be proved by the parol evidence of the justice of the contents of the docket. This was the decision in *Boomer v. Laine*, 10 *Wend.* 525. The docket is the best evidence of the judgment, and the statute requiring the judgment to be entered in it, the law presumes it has been, unless the contrary is made to appear. But when it has not, the minutes or memorandum of the justice, made at the time of giving the judgment, and filed with the papers in the cause, when proved by the justice, is competent evidence of the judgment:— See 11 *Johns.* 166; 13 *Johns.* 430; 6 *Vt.* 541.

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The judgment should be reversed, and a new trial ordered.

MARTIN CH. J., and CHRISTIANCY J., concurred.

CAMPBELL J.:

I have not been able to satisfy myself that the provisions of the statutes now in force, requiring a justice's judgment to be entered in his docket, in a case not tried by jury, are directory. If an unentered judgment could be construed as valid for all, or even for most purposes, under the provisions relating to the enforcement and proof of such matters, reasons of policy might prevail to sustain it. But there are very many cases in which, in spite of the construction sanctioned by my brethren, parties are still left to the risk of having their rights entirely lost by the carelessness of magistrates; and the relaxation of the rule in one instance will not remove the difficulty, which I think addresses itself rather to legislative than judicial discretion. In the case before us, the justice has certainly taken pains as far as he went, and the defense is not meritorious; but the rule would of course reach cases of less merit. I am reluctantly compelled to differ with the majority of the court, and am of opinion that the Circuit Judge acted properly in ruling out the proofs offered.

Judgment reversed.

William Woodbridge v. The City of Detroit.

The Charter of Detroit provides that the Common Council may cause the streets to be graded and paved, and assess the whole expense of such grading and paving in front of any particular lot, to the center of the street, upon such lot, and makes such assessment a lien upon the premises until paid, and also a personal charge against the owner, and authorizes a warrant for distress and sale of his goods for the same. Whether this provision is constitutional and valid, *quære*? *Held*, by MANNING J. and MARTIN CH. J. that it is: By CAMPBELL and CHRISTIANCY JJ., that it is not.

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WOODBRIDGE v. THE CITY OF DETROIT.

MANNING J. held that the provisions in the Constitution with respect to taxation do not apply to assessments for local improvements; and valuation of the property taxed for such improvements is not a necessary element in the apportionment of the taxes. CHRISTIANCY J. concurred.

2: That such assessments need not be co-extensive with the county, city or ward in which the improvement is made, and that the rule of apportionment, by valuation of property or otherwise, is for the Legislature to determine. CHRISTIANCY J. concurred substantially, though differing as to what is apportionment.

3: That there is nothing in the power of taxation itself requiring a tax to be apportioned in any particular way, and that the rule by which the amount of tax to be paid by each tax-payer is to be determined—which is all that is meant by apportioning a tax, when applied to him—cannot be made a test of the taxing power.

4: That the provision in question is valid as the exercise of the power of taxation, and in no sense an exercise of the right of eminent domain. There are here all the characteristics of a tax: A public burden imposed by law; a description of the property and persons by whom it is to be borne; the contingency on the happening of which it is to be imposed, and the apportionment of it in pursuance of law. The demand of each person is not made without reference to the amount contributed by others, but the aggregate cost of the whole work is apportioned among the several lot owners in proportion to the work done in front of their respective lots.

MARTIN CH. J. concurred in all respects with MANNING J.

CHRISTIANCY J. held, that to constitute a tax or assessment, or an exercise of the power of taxation, there must be a common public burden within some particular district, which burden must be apportioned by some rule of apportionment, by which the amount paid by one person or piece of property shall bear some relation to, or be affected by, the amount paid by another: that there is here no public or common burden within the district to be imposed, and consequently no apportionment. It is a private individual burden, imposed for a public purpose; each lot or tract, and the owner, being charged in gross with the entire expense of the improvement in front of it, without any reference to the amount to be paid by any other lot or tract, and the amount paid by one having no relation to, nor being increased or diminished by, that paid by another.

2: That this burden is, therefore, not a tax, nor an assessment; nor is the mode of apportioning it an exercise of the taxing power; that it rests entirely upon the idea of a duty on the part of the owner, to make the improvement in front of his lot; in this respect resembling a police regulation; but that it cannot be justified as the exercise of the police power, because *first* the idea of a duty is not carried out—the owner not being allowed to make the improvement—and, *secondly*, because the raising of money for the grading and paving of streets is not a subject for the exercise of the police power, but falls directly within the exercise of the taxing power.

3: That the proceeding authorized by the charter takes private property for a public improvement, without compensation, and in a mode not authorized by the Constitution.

4: That when property is taken in payment of a tax or assessment, the law presumes compensation in the proper application and expenditure of the tax; but when taken without any reference to the amount contributed by any other persons or property, it is an arbitrary, forced contribution, and there is no such presumption.

CAMPBELL J. concurred with CHRISTIANCY J. in his reasoning as to the illegal character of this system of charges upon property and its owners. He also held

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that the Legislature could not vest in the city authorities the power to make improvements, and charge the expense upon individuals on the idea of private benefits conferred.

2: But that if it could, this provision of the charter is not valid, since it makes no provision for ascertaining such benefits. The Legislature can not arbitrarily determine that any lot is benefited by the precise cost of an improvement in front of it, and that no other lot is benefited at all.

3: That the clauses in the Constitution requiring taxation to be by uniform rules, are applicable to the case of taxes or assessments for local improvements of this character; that they must be assessed upon some uniform standard, either of value or something else, which will afford a means of comparison; and that while there is no restriction upon the Legislature in defining the size of the districts within which the apportionment of the burden is to be made, single lots, made chargeable, as in this case, without any reference to size or extent, are not districts, and there is no room for apportionment or uniformity.

Heard January 4th. Decided June 1st.

Case reserved from Wayne Circuit in Chancery.

The bill was filed against the city of Detroit, and William Cook, city collector, to restrain the collection of a tax assessed for the grading and paving of a part of Fort street.

The bill shows that, in 1859, the Common Council of Detroit passed an ordinance directing the paving and grading of Fort street, and the placing of curb stones along the same, through a portion of complainant's land lying upon the same, and for a short distance above: That for fifty feet front of this improvement, the land of Lucy Maria Abbott was assessed $132 60, and for the remainder, being 810 feet front on the westerly side, and 860 feet front on the easterly side, the land of complainant was assessed $4,436 80: That the Common Council have issued their warrant for the collection of this assessment, and in default of complainant paying the same he is liable to have his goods and chattels seized for the satisfaction thereof: That he has not goods and chattels sufficient to satisfy the same, and the Council will proceed to sell the lands assessed therefor if the goods and chattels prove insufficient: That the assessment constitutes a cloud upon his title: That the paving, &c. has been done, but without his assent and against his remonstrance

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and that the provision of law authorizing such assessment is unconstitutional.

A temporary injunction having been granted, defendants moved to dissolve the same, and on such motion the Circuit Judge reserved the constitutional question raised by the bill for the opinion of this court.

T. Romeyn, for complainant.

1. The remedy by injunction is proper:—*LeFever v. Detroit*, 2 *Mich.* 587; *Caroll v. Safford*, 3 *How.* 441, 463; *Burnett v. Cincinnati*, 3 *Ohio*, 86; *Ohio State Bank v. Knoop*, 16 *How.* 369; *Dodge v. Woolsey*, 18 *How.* 331, 339, 340.

2. The paving of the street, like the first taking of its soil, is for the *use* of the public. To sequestrate a citizen's property for this purpose is, in fact and in principle, to take it for the public use. And as no compensation is provided, either by estimated benefits or otherwise, such taking is unconstitutional:—See 11 *Johns.* 77; 3 *Wend.* 263; 4 *Hill*, 76; 6 *Barb.* 214; 9 *Barb.* 535; *Ang. on Highways*, 144 *to* 165.

There is nothing in the principles of taxation, nor in the adjudications in other states, sustaining and justifying this proceeding:—*Ang. on Highways*, *Ch.* 4; *People v. Mayor of Brooklyn*, 4 *N. Y.* 419.

J. L. Chipman, and *G. V. N. Lothrop*, for defendants:

The assessment in this case is necessarily based on the idea of a benefit to the property assessed. The law itself implies that the courts have always so treated it:—11 *Johns.* 77; 4 *Hill*, 82. And hence though it is true as charged in the bill that the assessment is not made on an estimate of the value of the lots, or of their enhanced value, or of the resulting benefits, yet it is no less true, that the assessment rests on the ground of local benefit or improvement to the lots by reason of the paving. And

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no averments of the bill can negative this fundamental idea of the law.

Paving is, or may be, a local improvement. It is authorized to be done upon that ground. The law properly vests the determination of the question when it will be such improvement in the Common Council. And their decision on this question, when there is a question, is not the subject of judicial review:—23 *Barb.* 166.

Local assessments like these in principle, have been upheld generally:—See 19 *Ohio*, 418; 1 *O. S. R.* 127; 5 *O. S. R.* 243; 6 *Humph.* 371; 1 *Swan*, 177; 6 *Cush.* 223; 4 *Comst.* 420; 23 *Barb.* 166; 2 *Mich.* 568.

There is another objection to this injunction. The bill does not show that there is any process now on foot, except for the collection of this tax out of complainants chattels. The sale of the land is only a remote and contingent liability, for which no proceedings have yet been taken. The real gist of the bill is to prevent our taking complainant's goods and chattels, which, on the supposition that the assessment is illegal, would be merely to prevent a trespass to personal property. But the court will not ordinarily interfere by injunction to restrain a mere trespass, nor ordinarily to restrain the collection of an illegal tax out of goods and chattels; and generally will not restrain the collection of taxes and assessments except on strong and clear equities:—6 *Johns. Ch.* 29; 26 *Wend.* 135; 10 *Paige*, 539; 9 *Paige*, 387; 4 *Barb.* 9; *Ibid.* 17; 15 *Barb.* 255; *Ibid.* 385; 26 *Barb.* 301; 3 *Ohio*, 370; 3 *O. S. R.* 36, 49; 25 *Conn.* 232; 2 *Mich.* 582.

Besides, the paving is all done, and of course the whole expense incurred. During the whole period of this expenditure the complainant lies by, and moves only when the collector comes around with his roll. But a party who asks an injunction to prevent an alleged injury, must act promptly. He will not be aided if he lies by while large expenditures are made:—18 *Ves.* 515; *Walk. Ch.* 249; 22

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Me. 207; 2 *Rand.* 99; *Saxton*, 518; 10 *Cush.* 252; 6 *O. S. R.* 119.

MANNING J.:

I can not see that the present case differs essentially from *Williams v. The Mayor of Detroit*, 2 *Mich.* 560. The city charter then in existence contained the following clause: "And the Common Council shall have full power and authority to provide funds for defraying the expenses of such paving of streets or sidewalks as may be deemed necessary, either by assessment on the owner or occupant of such lot or premises, in front of or adjacent to which such streets or sidewalks may be directed to be paved or repaired, or otherwise, as they may direct." And it was provided by a city ordinance that, "Whenever the Common Council of said city shall deem it necessary to provide funds necessary for defraying the expenses of grading, paving, or planking any alley, avenue, or street of said city, or any portion thereof, they shall cause an assessment to be made by the city surveyor on the owners or occupants of the lots or premises in front of or adjacent to the avenue or street directed to be graded, paved, or planked." And it appears from the opinion of the court that the aggregate cost of the pavement was "apportioned according to the width of each lot fronting on the street paved."

The assessment was held to be a tax, and not the taking of private property for public use.

The only difference between that case and the present is, that the revised charter requires the cost of paving and grading to be assessed "on the owner of the lot or premises in front of or adjacent to which" the paving and grading are done. In Williams' case the cost of the paving and grading was apportioned between the owners of the lots by the number of feet frontage each lot bore to the frontage of all the lots contiguous to the pave-

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ment. If the street in front of some of the lots had to be cut down, and in front of others to be filled up to bring it to the grade of the pavement, the expense was assessed on all the lots in proportion to their several frontage on the street. In the present case a different principle of apportioning the expense was adopted, to comply with the revised charter, which requires the owner of each lot to pay for the grading as well as paving in front of his lot. The thing is not impracticable. The work is done by contract; and to carry out the new rule of apportioning the aggregate cost of the whole work, the different parts of it should be, and I presume are, contracted at different prices — the paving at one price and the grading at another. Men will differ as to which of these two modes of apportioning the expense is most just and equitable. The difference, it seems to me, is not of such a nature that one can be a tax and the other not.

Judge Ruggles, in the case of *The People v. Mayor of Brooklyn*, 4, *Comst.* 423, says: "Taxation exacts money or services from individuals, as and for their respective shares of contributions to any public burthen."

"Private property taken for public use by right of eminent domain, is taken not as the owner's share of contribution to a public burthen, but as so much beyond his share."

"Special compensation is therefore to be made in the latter case, because the government is a debtor for the property so taken; but not in the former, because the payment of taxes is a duty, and creates no obligation to pay, otherwise than in the proper application of the tax."

"Taxation operates upon a community or upon a class of persons in a community, and by some rule of apportionment.

"The exercise of the right of eminent domain operates upon an individual, and without reference to the amount or value exacted from any other individual or class of individuals."

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I know of no case in which the distinction, with the reasons for it, between taking property by taxation and by the right of eminent domain, is more clearly pointed out; and I find no difficulty in sustaining the assessment in the present case on the principles stated by the learned judge.

Article 14 of the Constitution contains the following sections relative to taxation:

"SEC. 11. The Legislature shall provide an uniform rule of taxation, except on property paying specific taxes; and taxes shall be levied on such property as shall be prescribed by law.

"SEC. 12. All assessments hereafter authorized shall be on property at its cash value.

"SEC. 13. The Legislature shall provide for an equalization by a state board, in the year one thousand eight hundred and fifty-one, and every fifth year thereafter, of assessments on all taxable property, except that paying specific taxes."

Taking the three sections together, there seems to be no reason to doubt the taxes here referred to are the ordinary taxes raised for state, county, township and municipal government. The word "assessments" in the 12th and 13th sections, does not mean taxes in any sense, but the valuation of property for the purpose of raising the taxes referred to in the 11th section.

Taxes for purely local public improvements, like the one before us, more generally called assessments, are not mentioned in the Constitution, nor is it necessary they should be to give the Legislature power over them. The power to impose and collect such taxes, like all other legislative powers not mentioned in the Constitution, is plenary, and in the exercise of it is subject to legislative discretion only.

As this description of taxes does not come within the sections of the Constitution mentioned, valuation in the property taxed is not a necessary element in the apportionment of the tax. The apportionment of it may be based on valua-

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tion or not. This is for the Legislature to determine, which alone has power to prescribe the rule of apportionment. And as there is nothing in the power of taxation itself requiring a tax to be apportioned in any particular way, the rule by which the amount of tax to be paid by each taxpayer is to be determined (which is all that is meant by apportioning a tax when applied to him) can not be made a test of the taxing power.

But the Constitution provides, "Private property shall not be taken for public improvements in cities and villages without the consent of the owner, unless the compensation therefor shall first be determined by a jury of freeholders, and actually paid or secured in the manner provided by law." Art. 15, § 15.

The taking here referred to is the taking of private property by right of eminent domain, which can not be done by the city of Detroit except in the manner stated.

Admitting money can be taken in this way, is the attempt made to take it in the present instance by right of the taxing power, or by right of eminent domain? If the former, the city is entitled to it; if the latter, it is not, because it has not taken the requisite steps to perfect its right.

In the case before us we have all the characteristics of a tax, and not a solitary characteristic of the exercise of the right of eminent domain.

The money is demanded as complainant's apportionment or share of the cost of paving a part of Fort street, on which he and others have lots fronting on the part of the street paved; and the law imposes on him and them the cost of the paving as a public burden, and prescribes the rule by which that burden shall be borne by them respectively.

Here, then, we have all the characteristics of a tax: A public burden imposed by law, a description of the property and persons by whom it is to be borne, the

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contingency on the happening of which it is to be imposed, and the apportionment of it in pursuance of law. With all of these characteristics of a tax, there is not a solitary characteristic of a taking of property by right of eminent domain. The warrant of the collector does not demand property of complainant only, but of him and others; nor does it demand property of him only, for public use, for it at the same time, makes a like demand of others for the same use. Nor is the demand made on him uncertain in amount, or made without reference to the amount to be contributed by others. The aggregate cost of the whole work is apportioned among the several lot owners, in proportion to the work done in front of their respective lots.

If the case before us is not an attempt to take private property for public use, without making compensation as required by the Constitution, it is most clearly a tax, and as such, subject to no rules but legislative discretion. In the case of *The People v. Mayor of Brooklyn*, Judge Ruggles says it is the duty of the Legislature "to prescribe the rules on which taxation is to be apportioned," and that its determination, "being within the scope of its lawful authority, is conclusive." And in *Brewster v. City of Syracuse*, 19 *N. Y.* 116, in which the constitutionality of the power was again before the same court, Johnson Ch. J., in delivering the opinion of the court, says: "The nature of this power was fully examined in *The People v. Mayor of Brooklyn*, 4 *Comst.* 419, and it was declared to be a part of the legitimate exercise of the state's power of taxation, to ascertain, subject to no judicial review, the public burdens to be borne and the persons or class of persons who were to bear them. It would, therefore, have been within the clear authority of the Legislature to have authorized the city government of Syracuse, without the consent of any person specially interested, to construct this sewer, and to assess, by way of tax, the expenses on

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such persons as ought, in the judgment of the Legislature, to bear the burthen."

It is quite evident, from the large number of cases to be found in the books of reports of the several states, that courts have experienced much difficulty in supporting this kind of legislation; and yet in almost every instance it has been sustained. The difficulty, it would seem, has generally been in determining the assessment to be a tax, because of the supposed injustice or inequality of the assessment by reason of its not being co-extensive, as in case of ordinary taxes, with some one of the civil divisions into which the state is divided for governmental purposes; that is, on all the taxable property of the county, township, city, or ward, in which the improvement is made.

When the consequences of a statute are not subversive of the very end and object of a constitutional government, they can not, — if the Constitution itself contains no inhibition, and if it does there is no occasion to resort to them, — be made the basis for declaring the law unconstitutional. In construing a statute the case is different, for the reason that they are not used to overturn the law, but to give a reasonable interpretation to the intention of the Legislature, and the language of the statute when it it is susceptible of more than one meaning. But to go beyond this, and give them the effect of annulling a statute, would be an assumption of legislative functions.

The supposed hardship in many if not most cases, it seems to me, is more imaginary than real. Things with which we are not familiar not unfrequently, at first view, meet with condemnation, although undeserving of it, while those with which we are familiar, and that really deserve condemnation, are looked upon as right in themselves. A law requiring the owner of a lot of ground in a dense and populous city, for the accommodation of the people and vehicles that throng its streets, to pave the street in front of his lot, and his neighbor to do the same thing,

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is looked upon by many as unjust and inequitable. Now, we have a statute requiring a specific tax of four per cent. to be paid on all ores, with the exception of iron ore, which pays but two per cent. Why this difference between iron and other ores? Why are not all ores taxed alike? And why is the miner required to contribute to the public the one twenty-fifth or one fiftieth part of the product of his mine, as the case may be, while no such tax is imposed on the products of the farmer? Again, a pedler on foot is required to pay a specific tax of $10 a year; if he uses a horse in his business, $25, and if two horses and a vehicle, $50. Why this difference? Is it that he who goes best prepared to accommodate his customers must pay most? But why is he required to pay a tax at all? Is it because, as a vender of goods, or traveling merchant, he goes to his customers instead of requiring them to come to him? If we were not accustomed to such and the like taxes, and they were now for the first time about to be introduced, we have no doubt we should hear much of their injustice and unconstitutionality. They differ, however, from the tax before us, in this, that while the exigency, the growth of a large city, that renders pavements necessary, at the same time increases the value of the lot on which the burden is imposed ten, twenty, or, perhaps, fifty times the amount of that burden, nothing of the kind exists in the case of the miner, whose ores are not more valuable by reason of the public exigency that stands in need of his money.

For all ordinary purposes of government, the Constitution makes it the duty of the Legislature "to provide a uniform rule of taxation, except on property paying a specific tax," &c. And this uniform rule of taxation is to operate on property assessed at its cash value. But the Constitution has never been understood as requiring the rule to be so framed as to make each piece of property of the same value, throughout the state, pay the same amount of tax. Such

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a rule would be uniform, but it has not been adopted. The taxable property of the whole state is taxed to pay state expenses, and that in the counties only to pay county expenses, and in townships to pay township expenses. All of these expenses pertain to the administration of the government, but each piece of property of the same value, in every part of the state, does not pay the same amount of tax — the equality and uniformity of the rule of taxation consisting in requiring each county and township to pay its own expenses. These expenses are not probably the same in any two counties or townships in the state, and it is not likely that a $1,000 worth of property in any two townships in the state contributes the same amount in any one year for the support of government. We hear of no complaint, in all this, of inequality, or of a want of uniformity in the rule of taxation. Each county and township is required to pay its own expenses, because it is more directly interested in, and benefited by, such expenses than other counties or townships, or the state at large.

This rule of taxation, it seems to me, is analogous to the one by which the cost of the paving is apportioned in the present case; and that, to make the analogy complete, it is only necessary to suppose the counties and townships to be individuals instead of political corporations. The reason of the rule is the same in both, and its justice as obvious in one case as in the other.

The current of authorities is, that assessments for local improvements need not be co-extensive with the county, city, or ward in which the improvement is made; and this, it seems to me, removes the only obstacle in fact to this species of taxation, that courts have had to encounter where the state Constitution was silent on the subject.

To show the state of the law at different times in the state of Kentucky, I will refer to two decisions made by the Court of Appeals of that state. In *Suttons's Heirs*

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v. City of Louisville, 5 *Dana*, 28, it was held the expenses of a local improvement must be borne by the whole city, and not by the property more directly benefited by it. This case was, in effect, afterwards overruled by the same court, in *The City of Lexington v. McQuellan's Heirs*, 9 *Dana*, 513, Ch. J. Robertson giving the opinion of the court in both cases. The charter of the city of Lexington authorized streets to be paved or turnpiked "at the cost and expense of the lot owners fronting such street or alley." A cross street, extending the length of a block, was graded and macadamized. A deep cut was made opposite the lot owned by McQuellan's heirs, and the expense of making it was assessed on their lot, and not on all of the lots on both sides of the street. The court sustained the constitutionality of the charter authorizing an assessment, on the ground that, for the purpose of making such improvements, the charter might be considered as making each block a separate municipality. But as the charter required the expense of grading to be borne by all the lots, the decree of the court below enjoining the collection of the assessment was reversed, as the city should have been enjoined against collecting the excess of the assessment only. Had the charter authorized the expense of the grading to be assessed on the lot in front of which it was done, the charter would still, I think, have been sustained by the court; for, in speaking of the city at large, — and the remark was strictly applicable to the block where the improvement had been made, and the attention of the court was called to the point by the assessment before them, — they say: "And if all those ways should be reconstructed or repaved during the same fiscal year, we are not prepared to question the public authority to require each of the owners of grounds on the streets respectively, to pay one-half of the cost of the improvement made opposite to his lot."

I think the questions reserved for the opinion of this court should be answered in the affirmative.

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MARTIN CH. J.:

I concur fully in the views of my brother Manning.

CAMPBELL J.:

The principal question to be decided in this case is, whether the provisions of the charter of Detroit, authorizing the expense of grading and paving streets to be collected against the owners of land abutting on the streets are valid.

These provisions are somewhat different from any which have been passed upon in other states, so far as my observation has gone. The taxes are not distributed through any district, larger or smaller, upon any given ratio, but each lot is chargeable with the whole expense of grading and paving in front of it, and not with an aliquot portion of the grading and paving of a block or district. By § 8 of Ch. 8 of the Revised Charter (*L.* 1859, *p.* 132) the Council are authorized "to levy, assess, and collect a tax or assessment on all lots, premises, or subdivisions thereof, sufficient to defray the expenses of grading and paving, graveling, macadamizing, or planking any highway, avenue, street, lane, alley, or crosswalk in said city, in front of or adjacent to such lots, premises, or subdivisions thereof, and of putting curb-stones or "culverts therein; which tax or assessment shall be credited to the street paving fund." A similar provision occurs in subdivision 11 of section 21, in chapter 5 (*L.* 1859, *p.* 96) which, however, provides further for street crossings not opposite any lot, and for interior public spaces, and allows the Council to apportion the expenses of improving these at its discretion, and without any rule, upon the adjacent block. Where such paving is at the intersection of streets adjacent to the point of a triangular block, the Council are authorized to assess against the whole city so much as they deem just.

There is, then, no provision which divides the cost of

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an improvement as a whole upon property or persons by any rule of proportion whatever. Two lots side by side contribute alike when the surface is uniform, but not otherwise. And for those taxes which are distributable through a block, there is no rule of apportionment prescribed, the Council being left to a full discretion.

The first question that arises is, under what division of powers is this exercise of authority to be classed? It was held by the former Supreme Court, in *Williams v. The Mayor, &c., of Detroit*, 2 *Mich.* 560, that these expenditures and charges could only be justified under the taxing power, as the imposition of burdens for public purposes. Such is the course of modern decisions; and if it be not an exercise of the taxing power, it is not easy to find any basis for it to rest upon.

Assuming this, if valid at all, to be an exercise of the power of taxation, it is claimed that the law must be governed by one or both of two constitutional provisions, which are as follows:

Art. 14, sec. 11. "The Legislature shall provide an uniform rule of taxation, except on property paying specific taxes, and taxes shall be levied on such property as shall be prescribed by law."

Sec. 12. "All assessments hereafter authorized shall be on property at its cash value."

Street improvements have been made the subject of much judicial discussion, and we have been referred to a number of decisions which have a bearing to some extent upon the case before us. The grounds on which they have been attacked or sustained vary, and it may be useful to refer to some of the distinctions.

In New York it has long been customary to apportion the expense of such improvements upon property benefited, in proportion to the amount of benefit in each instance. These benefits are ascertained by some competent board of assessors, who are governed by no arbitra-

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ry rule. After fluctuating a long time among various reasons, the Court of Appeals, in *The People v. The Mayor, &c., of Brooklyn*, 4 *Comst.* 419, settled down upon the taxing power as the one resorted to. But, inasmuch as it could not be reconciled with the idea of general taxation, because not apportioned within any specific district ascertained by law, a distinction was taken between ordinary taxation, which it was admitted must be uniform, and "*assessments*" for local purposes, which it was held were, so far as the district of apportionment was concerned, subject to no rule but legislative discretion. The right to make the distinction was based upon a constitutional provision, which expressly recognized "assessments" in municipal corporations as distinct from taxes.

In Ohio the right was sustained of assessing the improvement on the property benefitted, in *Scovill v. Cleveland*, 1 *O. S. R.* 126. And in this case, as well as in *Hill v. Higdon*, 5 *O. S. R.* 243, where the whole assessment was divided ratably upon the premises within the range of the improvement by their frontage, the right to make such assessments was based expressly upon a provision in the Constitution borrowed from and identical with the one which was relied on in the case of *The People v. The Mayor, &c., of Brooklyn*, in New York. In Illinois the assessments have been maintained on the ground of benefits to the property.

There are some cases where the decisions have applied to building or clearing sidewalks, which have been placed on different grounds. In *Bonsall v. Lebanon*, 19 *Ohio*, 418, the assessment by frontage seems to have been upheld on the ground that the duty was general throughout the town, and therefore the tax uniform. As there was no grading, this would be substantially true. The case, however, is not reasoned fully. In Massachusetts an ordinance for cleaning sidewalks is plainly to be referred to the police power: — *Goddard's case*, 16 *Pick.*, 504. And

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it appears that the charges for sidewalks do not all fall upon the property owners, but in part upon the cities, and also that, after requiring one to be built, a second cannot be required, but the public must maintain them. *Lowell v. Hadley*, 8 *Met.* 191; *Lowell v. French*, 6 *Cush.* 223. In *Mayor v. Mayberry*, 6 *Humph*, 371, the right to require sidewalks is based on the right to remove nuisances—a foundation the propriety of which is not very apparent. In *Washington v. Nashville*, 1 *Swan*, 177, the right of the public is laid down as absolute.

If the right to make improvements and charge them to property owners is to be based upon the idea of private benefits created, I am entirely clear that no such power is maintainable. No principle is better settled than that private property cannot be taken by the government for private use, and it is equally clear on principle, that taxation in general can only be justifiable for public purposes, affecting large or small localities. The improvement of private property is no part of the objects of government. Unless a work is needed by the public, the public have no right to make it, and if needed, no individual should be compelled to pay except as a proportionate share of a public burden. The very distinction between taxation and the taking of private property is laid down in express terms by the court of New York, in *People v. Mayor of Brooklyn*, to be, that in the former the individual contributes only his share to a public burden, while in the latter he contributes beyond his share, and is entitled therefore to a compensation for the excess. This distinction is quoted with approbation by the Ohio courts from the language used in New York. I am unable to see how, under such a distinction, that can be regarded as a legitimate exercise of the taxing power which requires more than a proportionate share to be contributed. It does not follow, because the power is not that of taking property for public use,

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that it is the taxing power. It may be neither, and illegal and arbitrary for the very reason that it is neither.

In Louisiana, in the case of *Municipality No. 2 v. White*, 9 *La. Ann. R.*, 446, under a constitution which contains the same terms with the two sections of our own already cited, it was held that the doctrine of benefits was inadmissable, and that these improvements must be made by a general *ad valorem* tax within some fixed district. In *Sutton's Heirs v. City of Louisville*, 5 *Dana*, 28, it was held that benefits could not be regarded And in *City of Lexington v. McQuillan's Heirs*, 9 *Dana*, 513, it was held that, within the paving districts created by the statute, the expenses of paving and grading must be ratably distributed upon some uniform system of distribution, and, accordingly, an assessment which charged against one lot the expense of paving and grading in front of it, was held void, because the work should have been apportioned as an entirety. In *Weeks v. City of Milwaukee*, lately decided by the Supreme Court of Wisconsin, a special assessment was held valid only because the constitution of that state had adopted the precise language used in the New York Constitution, distinguishing between assessments and general taxation; the court declaring expressly that, if that phrase had not been found, they would have had no difficulty in declaring the act void.

When we consider the fluctuations in New York, and also the fact that the benefit system is there an ancient one, reaching back to the early days of the colony, we may very fairly doubt whether it would have been recognized or created in modern times had it not been found already in existence. No court has yet succeeded in laying down any reasons which vindicate it as in any sense within the taxing power. And in that state it originated under the ordinary application of the right of eminent domain — in which, however, on principle it has but little better foundation.

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In the case of *Williams v. Mayor, &c., of Detroit*, 2 *Mich.* 560, our own Supreme Court, while not deciding the point, intimated very strongly that benefits were not properly to be regarded in these cases (*p.* 572). And the tax in that case was sustained on the express ground that it was apportioned through a district. It was held that the present Constitution did not govern, because the law was prior to it, and therefore the question involved here did not arise.

In examining our present Constitution, it will be found that while we have adopted the section of the New York Constitution in which the courts of New York, Ohio and Wisconsin, have found their only authority for discretionary assessments as different from taxes, we have, in adopting it, striken out the very language on which all of those courts rely for the distinction: — *Sec.* 13 *of art.* 15, *Const. of* 1850. This being so, the argument, so far as it rests upon that foundation, is of no force here, and must be maintained upon other reasons if at all. But without this clause, it is not sustained upon most of the authorities cited.

Assuming, however, that benefits may be properly regarded, the law before us contains no provision for ascertaining them. The Legislature certainly cannot determine that any lot is benefitted by the precise value of an improvement in front of it, and that no other lot is benefitted at all. In New York, in the case cited, the benefits were ascertained as a matter requiring the use of judgment and discretion by a competent board or officer, very much as property is assessed in other cases.— So it was also in *Scoville v. Cleveland.* Under our statute, the matter is entirely arbitrary, and there is no uniformity whatever. The city may grade and pave in front of a single lot at a time, and the cost against one fifty-foot lot may be double that against the next one, if the ground is uneven. The law does not define what is meant

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by "adjacent" property, or how far it shall be allowed to be reached. The law does not provide how large a lot or block shall be, nor determine any limit of extent as coming within a taxing lien. A lot fifty feet wide by one hundred deep may stand beside a tract three miles deep, as this very case exemplifies, and the law does not provide any means of distinguishing between them. A lien for fifty dollars may in one case be confined to a lot of small value, and in the other encumber the title of a large estate. And if a parcel of land extend on a paved street with a depth of but a few feet, the law points out no way of holding the rest of the block, which must necessarily be benefited in some degree at least by the improvement. This law cannot, upon the most liberal construction, be held to rest upon the basis of compelling the parties or premises benefited to bear the burden.

The principle of uniformity, which our Constitution requires, is really no new requirement, but in some way enters into every proper tax, and is recognized in all the decisions upon assessments as well as taxes, as essential to the validity of all these charges. And where it is sought to require each party benefited to contribute according to the amount of his benefit, the ratio is intelligible and just, if he should be compelled to pay on the basis of private benefits at all.

And there is no restriction upon the Legislature in defining the size of districts. Our road districts are instances of this. And if a charge is made on a uniform rule within any prescribed district, there can be no very good reason for objecting to it because the district is large or small, if the rest of the city is made to bear its own local burdens on a substantially similar basis. But single lots, if all are made chargeable without any reference to size or extent, are not districts, nor is there any room for apportionment or uniformity. The very term taxation, whether used in a conconstitution or elsewhere, signifies a proportioned charge,

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upon some uniform standard, either of value or something else, which will afford a means of comparison.

I can see no reason why the clause of our Constitution requiring taxes to be by uniform rules does not apply to this case. Neither do I myself perceive why the rule of valuation should not be held to be intended to apply, as it certainly does apply literally, to the same thing. If there were any reason why a valuation tax for local purposes would not operate as justly as any other, there might be reason for endeavoring to find another construction. But the whole controversy upon this subject has shown that the valuation rule has advantages in most cases over any other and in assessing benefits it is undoubtedly followed to a considerable extent. The only decision which we find any where, upon a constitution requiring taxes to be upon a valuation, applies the requirement to these assessments:— *Municipality No. 2 v. White*, 9 *La. Ann. R., above cited.* It affords a nearer approach to uniformity than any other, and it is this very quality that has caused its adoption for general taxation, and the power of exemption affords very full room for correcting its defects, where certain classes of property or improvements should be spared, in whole or in part.

So far as the Constitution is supposed to confer or authorize the conferring of powers of local legislation and management upon cities and counties, those powers must be construed and measured in view of the whole instrument.— There are many clauses which limit and control this authority. It cannot be supposed that the Legislature is permitted to create in our midst a number of irresponsible and unchecked municipalities, whose citizens are to be withdrawn from the protection of the general laws of the land. Whatever powers can be granted to cities, they certainly can not exceed those to be exercised by the Legislature that creates them.

I agree entirely with the views expressed by my

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brother Christiancy in the reasoning by which he has demonstrated the illegal character of this spurious system of charges on property and its owners. And irrespective of the views I have expressed, as my individual opinion, upon benefits as a foundation for assessments, and upon the express clauses of the Constitution referred to, I concur with him that the taxing power, in whatever shape it is exercised, must be exercised with some regard to a distribution of burdens, and not arbitrarily. For the reasons I have given, and also for those which he has elaborated, I concur with him in regarding the provisions of the charter in question as invalid.

CHRISTIANCY J.:

The eighth section of chapter eight of the revised charter of the city of Detroit (L. of 1857, p. 132) purports to give the Common Council power to "levy, assess, and collect a tax or assessment on all lots, premises, or subdivisions thereof, sufficient to defray the expenses of grading and paving any street, lane, alley, &c., in front of, or adjacent to, such lots, premises, or subdivisions thereof, and of putting curb-stones and culverts therein;" the term "adjacent" being here obviously used in reference to alleys and not to streets.

By the fourteenth section of the ninth chapter, such tax or assessment is made a lien upon the premises till paid, and the collector is also authorized to collect the same of the person taxed, by distress and sale of his goods and chattels.

By reference to the eleventh subdivision of the twenty-first section of chapter five (L. of 1857, p. 96), in connection with the eighth section of chapter eight, above referred to, it is evident that there is to be no apportionment of the expenses among the owners of the various lots along the street to be paved, but the whole expense of the grading and paving in front of any particular lot,

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to the centre of the street (whatever may be its amount, and without any reference to the amount paid by any other lot), is imposed, in gross, upon the lot.

Under these provisions, and without the assent of complainant, the Council levied what the charter assumes to call "a tax or assessment, on the lands of the complainant," for the grading and paving of Fort street, which passes through the complainant's farm, to the full amount of the expense of such grading and paving; and have issued their warrant to the collector for the collection of the amount (between four and five thousand dollars) from the goods and chattels of the complainant. The complainant has not goods and chattels sufficient to pay the amount.

Have the Legislature, in authorizing this mode of raising the funds for this improvement, exceeded their constitutional power? This is the only question in the cause; for, if the act is, in this respect, unconstitutional, the case, I think, sufficiently shows a constitutional right of the complainant about to be violated in the proceeding complained of, not merely by the seizure and sale of his goods and chattels, but by casting a cloud upon the title of his real estate.

I shall not here enter upon the discussion of the general nature of state constitutions and legislative power: but, for my own views of these general principles, I shall here only refer to my opinion given in the case of *Sears v. Cotterell*, 5 *Mich.* 256. To the views there expressed I still adhere.

I am not, therefore, to inquire whether the power in question has been granted, but whether it has been prohibited, by the Constitution; and, unless I shall be able clearly to see that some certain provision of the Constitution has been violated, I shall be compelled to uphold the constitutionality of the law, whatever I may think of its expediency.

If, as is claimed by the complainant, this be such "tax

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or assessment" as is contemplated by the eleventh and twelfth sections of the fourteenth article of the Constitution, it is clearly void, as it is neither assessed by any uniform rule, nor on property at its cash value. These sections are as follows:

"SEC. 11. The Legislature shall provide an uniform rule of taxation, except on property paying specific taxes; and taxes shall be levied on such property as shall be prescribed by law.

"SEC. 12. All assessments hereafter authorized shall be on property at its cash value."

I do not think these provisions were intended to apply to taxes or assessments for such local improvements in cities and villages. It is certain that these provisions have relation to taxation for raising the general revenue for state, county, and township (and probably city) purposes, whether they have any greater extent or not. The "assessments" mentioned in the twelfth section can not be construed in the sense of a special tax, or sum of money raised for local purposes, as contra-distinguished from general taxes, but in the sense of ascertaining the value of property, as a prerequisite to the imposition of a tax. If this be not so, then there is nothing in the Constitution which requires the assessment of general taxes to be "on property at its cash value."

The distinction between general taxes and special burdens or assessments, imposed for local purposes, has always been well understood in this state, and was generally recognized in all those states whose institutions and judicial decisions had most influence here at the time of the adoption of the Constitution; and such local assessments were not then, and never have been, understood here as referred to by the general provisions of statutes in reference to "taxes." This is sufficiently evident from the authorities cited by the defendant's counsel. Besides, if these local assessments are within these sections, then no pro-

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perty paying "specific taxes," such as that held by railroad companies in the city of Detroit, would be liable to any assessments for streets or sidewalks; this would be contrary to the universal understanding. See also *Canal Trustees v. Chicago*, 12 *Ill.* 405; *Ottowa v. Trustees, &c.*, 20 *Ill.* 423; *Nassau street*, 11 *Johns.* 77.

But the next section (13) of the same article of the Constitution, requires the Legislature to "provide for an equalization, by a state board, once in five years, of assessments on on all taxable property, except that paying specific taxes." Surely this provision, directly connected with those in the 11th and 12th sections, can have no reference to local assessments for paving, but only to such assessments as furnish the basis of the ordinary annual taxes. The Constitution of Louisiana, under which the case of *Municipality No. 2 v. White* was decided, has no such provision in reference to equalization, and, though similar to, is not identical with ours in reference to taxation and assessment.

There being no other limitation in the Constitution upon the taxing power of the Legislature than those already noticed, it follows that if the mode of raising the expenses of grading and paving, provided by this charter, can, in any just sense, be considered a tax or an assessment, or if, independent of the Constitution, it could be considered as an exercise of the power of taxation, it is free from all constitutional objection.

If an exercise of the power of taxation, then, though it does take private property for a public use, it is not without compensation; as the owner is always supposed to receive compensation in the benefits conferred by government in the proper application of the tax. And if the provision of the Constitution, against taking private property for public use without compensation, is to be construed to apply to any case in which the property is not taken in kind, to be itself used by the public, then the presumption of compensation, in the mode just men-

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tioned, must be a conclusive one in all cases where the property is taken in payment of a tax; or no valid tax could ever be imposed or collected; since human wisdom has never devised, and never can devise, any system of taxation which will not produce great inequalities, both in the apportionment of the tax and in the benefit to arise from its expenditure. And however equally imposed, and though with express reference to benefit, there will yet be individual cases where the person taxed will, in fact, be injured, rather than benefited, by the expenditure.

But if the mode of raising the money in the case before us is not an exercise of the power of taxation, then it may become a very grave question whether it does not fall within the prohibition of the ninth and fifteenth sections of article fifteen of the Constitution, against taking private property for public use for improvements in cities and villages without compensation.

The early cases in New York, which have been followed in many other states, and which held that assessments for streets and other local purposes were not a tax, because they were a benefit rather than a burden, can have little weight in determining whether the provisions of the charter here in question are an exercise of the taxing power. The power to exact money or property from individuals, for a public improvement, must rest upon the public necessity and the public convenience, not upon the private benefit to the individual. The latter is but an incident which grows out of the exercise of the power, and may and does furnish a very proper, and, in my opinion, the most equitable, rule for apportioning the public burden among individuals. But the statute before us does not profess to adopt the principle of private benefits in any respect whatever, though it may not be wholly inconsistent with it; since, probably, as a general rule, the land in front of which the improvements are made will be more benefited than those more remote; yet this is not so necessarily the result that the court can

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take judicial notice that it must be a benefit in all cases. And it is easy to conceive cases in which it would be an injury instead of a benefit. And if the private benefit had been made the basis of apportionment, the question whether benefit or not, and the amount of such benefit, would be questions of fact, to be ascertained in each individual case by some board or tribunal appropriately constituted for that purpose.

The Legislature is not competent to ascertain and adjudicate upon facts in individual cases, so as to bind private rights. This is not one of the functions of legislative power. See *Parmlee v. Thompson*, 7 *Hill*, 80, *and note.*

It is very certain that this is not a specific tax within the meaning of that term in the Constitution. And, with the single exception of specific taxes, the terms tax and assessment, both, I think, when applied to property, and especially to lands, always include the idea of some ratio or rule of apportionment; so that, of the whole sum to be raised, the part paid by one piece of property shall bear some known relation to, or be affected by, that paid by another. Thus: If one hundred dollars are to be raised from tracts A, B, and C, the amount paid by A will reduce, by so much, that to be paid by B and C, and so of the others.

In the case of specific taxes, as well as duties and imposts, though the amount paid by one is not affected by that paid by another, yet there is a known and fixed relation of one to the other, a uniform rate by which it is imposed upon the whole species or class of property or persons to which the specific tax applies; and this is so of duties and imposts, whether specific or *ad valorem.* To compel individuals to contribute money or property to the use of the public without reference to any common ratio, and without requiring the sum paid by one piece or kind of property, or by one person, to bear any relation whatever to that paid by another, is, it seems to me, to levy a forced contribution, not a tax, duty or impost, within

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the sense of these terms as applied to the exercise of powers by any enlightened or responsible government.

In the case before us there is no ratio, relation or common rule, or standard of apportionment, whatever. Nor can there be, unless we can judicially assume that there is absolute uniformity of soil and surface throughout the district to be improved, and even then the expense must often vary from other causes. The amount paid by one is neither increased nor diminished by that paid by another, nor is there any uniform rate, as in the case of specific taxes, duties and imposts. This is called the assessment of a tax; but there is nothing for assessors to do. What is actually done, and all that can be done, is to estimate the expenses of the improvement to be made in front of a particular lot, to impose that amount upon the lot and the owner, and to issue a warrant for its collection. This is the whole process of what is called "levying and assessing a tax or assessment." I can not, I confess, see anything in this process in the nature of an assessment, or the assessment of a tax; and, if not so in fact, the names by which the statute may have designated the process can not make it so.

This mode of imposing the burden would certainly seem to rest entirely upon the idea of a *duty* on the part of the owner to grade and pave the street in front of his lot; a duty which, it would seem, was supposed to grow out of the ownership; and in this respect it would seem to resemble a police regulation. And yet this idea of duty is not carried out; as the owner is not allowed to make the improvement for himself. But this supposed duty is made the basis of another duty, that of paying the city for making the improvement for him, which they will not permit him to make for himself, and of course without any default on his part in the performance of his duty. This case, then, differs essentially, if not entirely, from the cases in the state of New York, and many other states which have followed

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her example, where street assessments are, by statute, required to be made in proportion to the benefits to be derived from the improvement. In all those cases there will be found to have been a board of assessors, or some other officer or board, whose official duty it was to ascertain the relative amount of those benefits to each lot or tract along which the improvement extended, or within some other area or district; and the tax was imposed according to those benefits, thus ascertained. The whole sum to be raised, within the area or district to be taxed, constituted a common burden within such area or district. There was thus a clear principle for the apportionment of a public or common burden. The amount paid by one was affected by the amount paid by another. This, then, was essentially in the nature of a tax, and may well be held to be an exercise of the power of taxation, as shown by the very able opinion of Judge Ruggles, in *People v. Mayor of Brooklyn*, 4 *Comst.* 419. This case has been almost universally followed in every state where a similar mode of street assessments has been adopted. Every case of a street assessment cited by the counsel of the defendants, involves a similar principle. I do not here speak of sidewalks, but of streets. Even the case of *Hill v. Higdon*, 5 *O. S. R.* 243, where the tax was assessed at a uniform rate per foot front, was under a law requiring the assessment to be in proportion to the benefit; and the irresistible inference is, that in that particular case the assessors had ascertained that the benefit would be in proportion to the extent of frontage. But if the act had *required* the assessment to be in proportion to the frontage, this would have been an intelligible basis of apportionment. And a similar remark may perhaps be made upon the case of *Williams v. Mayor of Detroit*, 2 *Mich.* 560, where the charter authorized the Council to raise the funds substantially in the mode prescribed by the present charter, "*or otherwise as they may direct;*" and the assessment was made in proportion to the frontage: —See *pp.* 568 *and* 571. But

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in the case before us the sum demanded is no proportion of a common burden. There is no common burden to be apportioned.

With the exception of the case of *Weeks v. City of Milwaukee*, which rests upon a peculiar feature of their Constitution not found in ours, and where the absence of a rule of apportionment seems to have been overlooked, I have met with but one reported case in which it has been directly held that the duty and the whole expense of making a street improvement in front of the owner's property could be imposed upon the owner without reference to any ratio or rule of apportionment; and that is *State v. Dean*, 3 *Zab.* 335; and a similar principle may perhaps be involved in *State v. Mayor of Jersey City*, 4 *Zab.* 662, though in the latter case the statute (which I have not been able to find) seems to have required the assessment to be made upon the property benefited — the case does not say in proportion to the benefit. In *State v. Dean*, the doctrine was carried to such an extent, as in my view, to detract much from the authority of the case, since — if I rightly understand the case — it holds that, where the owner lays out and dedicates a street to the public, the public have a right before, and as a condition precedent to, acceptance, to compel the owner to defray the expense of putting it in order fit for use as a street. The principle upon which this can be done I have not been able to discover.

The distinction between the power of taxation and that of taking private property by right of eminent domain has, perhaps, no where been laid down with more clearness and precision than by Judge Ruggles, in the case of *The People v. Mayor of Brooklyn*, above cited. "Taxation," he says, "exacts money or services from individuals, as and for their respective shares of contribution to any public burthen.

"Private property, taken for public use, by right of eminent domain, is taken, not as the owner's share of contribution to a public burthen, but as so much beyond his share.

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"Special compensation is, therefore, to be made in the latter case, because the government is a debtor for the property so taken; but not in the former, because the payment of taxes is a duty, and creates no obligation to repay, otherwise than in the proper application of the tax.

"Taxation operates upon a community, or upon a class of persons in a community, and by some rule of apportionment.

"The exercise of the right of eminent domain operates upon an individual, and without reference to the amount or value exacted from any other individual or class of individuals."

In the general correctness of these distinctions I fully concur. Tested by these rules, the imposition of the burden in the case before us is not an exercise of the power of taxation, and the taking of property which the charter authorizes, unless it can be justified under a police power, is, within the rules here laid down, an attempt to exercise the right of eminent domain without regard to the constitutional restrictions upon that right.

It creates no public or common burden, but imposes a private individual burden for a public purpose.

It does not operate upon a community or class of persons or property by any rule of apportionment. There is no apportionment, *and nothing to be apportioned.* The amount required for the improvement in front of a lot is imposed *as an entirety* upon such lot, without any reference to the sum imposed upon any other lot. It operates upon an individual, and upon each distinct tract, without reference to the amount or value exacted from any other individual or tract, or class of individuals. If the act had been confined to the arbitrary exaction of a specified sum from a single individual by name, it would have involved the same principle of imposing the burden. If the Legislature have arbitrarily exacted one hundred dollars from A, will it render the act any the less objectionable because, without any

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reference to the sum exacted from A, they have with equal or still greater caprice required one hundred and fifty from B?

The grading and paving of the street is for the public use and benefit; the owner is entitled to no peculiar use of the street not common to the public, and though he may derive a greater benefit generally (which may be considered in apportioning a tax), yet it is the public use only which can justify the imposition of the burden, even as a tax. This law takes the property of the lot owner for this public use, not directly, it is true, but to be converted into money and applied to this public use. If taken under the taxing power, he is presumed to receive compensation in the expenditure of the tax; but if not so taken, there is no such presumption.

The Constitution, under the head of Corporations, article 15, section 9, provides, "The property of no person shall be taken by any corporation for public use, without compensation being first made or secured, in such manner as may be prescribed by law." Section 15 of the same article, "Private property shall not be taken for public improvements in cities and villages without the consent of the owner, unless compensation therefor shall first be determined by a jury of freeholders, and actually paid or secured in the manner provided by law."

It is true these provisions do not refer to a taking of property in payment of a tax, or a burden imposed under the taxing power, nor in payment of a debt or other duty to the public. It is doubtless true also, that these prohibitions are primarily aimed against a direct taking of property, to be used in kind by the public; though the language itself makes no such distinction, and the reason why it is properly so construed is, because all the recognized legal modes of indirect taking include the idea of compensation. This is the only reason for the construction. The maxim, therefore, applies to these prohibi-

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tions, in its full force, that, what cannot be done directly shall not be done indirectly. And, where indirect means are employed to accomplish what is forbidden to be done directly, the law rejects these indirect means, as of no validity, and treats the case as if the same end were obtained by direct means. If this were not so, the whole effect of the prohibition might, in all cases, be evaded with impunity by the simple device of making the process consist of two steps instead of one. And while the Legislature could not authorize the taking of A's land for a public park, they might, under the specious name of a tax or assessment, raise by the sale of A's land the whole sum necessary to pay B for his land, to be taken for that purpose; and from the sale of B's land fronting on the park, the whole expense of improving it and erecting a city hall upon it. And though they can not take and use your property directly, they may sell it, and use the money to purchase other property, of the same or any other description.

It is true that liability to abuse is not always, of itself, strong evidence of the non-existence of a power, since all legislative and all *human* power is liable to abuse. But the fact, that a proposed rule of construction would remove all constitutional restraint, is very strong evidence that the rule must be erroneous.

If it be claimed that the constitutional prohibitions in question do not apply to this mode of taking private property, because the constitutional mode of ascertaining the compensation is not applicable to such a case, the reply is, that this very fact may be very strong evidence that the taking is in violation of these prohibitions; since the property is taken in a mode not authorized by them, and it is forbidden to be taken in any other mode.

The Supreme Court of Ohio, in *Scovill v. Cleveland*, 1 *O. S. R.* 126, admit that where the proceeding, under the name of a tax or assessment, is merely colorable,

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and is really and substantially an exercise of the right of eminent domain, it should be treated as the latter, and held void. The same idea is taken for granted by the court, in *People v. The Mayor of Brooklyn*, above cited. The constitutions of Ohio and New York are substantially the same as ours, so far as respects this question.

But it may be said that, under a valid law, providing for the assessment of a tax upon any ordinary rule of apportionment, cases may occur where the rule of apportionment could not practically operate, and where the burden imposed upon one individual or tract would have no relation to that paid by another — that, under the acknowledged power of the Legislature to establish, or to authorize the Council to establish, assessment districts for local purposes, it may happen that the whole property in the district may consist of a single tract, and belong to the same person. This may be true, as a legal possibility, though it may be doubted whether it would be likely to occur in fact.

But as no such point is involved here, I do not propose to give a definite opinion upon a hypothetical case. The case supposed may, however, show the propriety of fixing some legislative minimum for assessment districts.— But should the Council, acting in good faith with reference to the public necessities, under a law authorizing a tax by some rule of apportionment, fix such district of reasonable extent, the power of taxation, I apprehend, would not be defeated by the accident of ownership. If the law fixes the rule of apportionment for all the property within the district, it could not probably make any difference who or how many might happen to own it; otherwise a valid rule might be defeated by the act of an individual. But the question is very different when the law provides *no* rule of apportionment, and applies *no* principle of taxation, within any district, as in the case before us.

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An accidental result may happen under any system or rule of law; but it does not follow that the Legislature may adopt the accident for the rule, because they had power to adopt the rule from which the accident resulted. Such a mode of reasoning would nullify every provision in the Constitution.

It only remains to inquire whether this mode of raising the expense of a public improvement can properly be held to fall within the class of police powers — a class of powers not generally supposed to come within constitutional provisions against taking private property for public use.

In Massachusetts substantially the same mode of imposing the burden for constructing *sidewalks* has been adopted as that provided for paving streets in the city of Detroit: — *City of Boston v. Shaw*, 1 *Met.* 137; *City of Lowell v. Hadley*, 8 *Met.* 180; *Lowell v. French*, 6 *Cush.* 223. These cases will be found to rest mainly and professedly upon the authority of *Goddard's Case*, 16 *Pick.* 504. This was an ordinance of the city of Boston requiring the owners and occupants of houses bordering on streets, to clear the snow from the sidewalks adjoining their respective houses and lands, and imposing a penalty for a neglect of this duty. This was expressly, and I think very properly, held to be a police regulation, and sustained on that ground; and the reasoning of the very able judge who gave the opinion of the court, shows that the decision was based substantially upon the principle of regulating the *use* of private property, or property partaking of the character both of public and private, in a manner deemed necessary to the public safety and convenience; which is, I think, the most prominent and distinctive feature of a police regulation. And the course of reasoning adopted is not applicable, in any appreciable degree, to the grading and paving of streets. The adjoining owner is recognized as having "a peculiar interest in

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and benefit from the sidewalk, distinct from that which he enjoys in common with the rest of the community [and consequently from that which he enjoys in the street]. He has this interest and benefit often in accommodating his cellar door and steps, a passage for fuel, and the passage to and from his own house to the street. To some purposes, therefore, it is denominated his sidewalk. For his own accommodation he would have an interest in cleaning the snow from his own door."

Now, the only feature in this case which can make it an authority for imposing upon the owner of a lot the whole expense of constructing a sidewalk in front of it is, I think, this "peculiar interest," or qualified property, which a man is supposed to have in the sidewalk; and this does not extend, in any appreciable degree, to the street itself. Accordingly, while a similar mode has been quite generally adopted in imposing the burden of building sidewalks — see (in addition to the cases above cited from Massachusetts) *Bonsal v. Mayor of Lebanon*, 19 *Ohio*, 418; *Mayor v. Mayberry*, 6 *Humph.* 368; *Washington v. Mayor of Nashville*, 1 *Swan*, 177; *Paxon v. Sweet*, 1 *Green*, (*N. J.*) 196 — it seems much less generally applied to streets. And, in Ohio, Tennessee, and New Jersey, this principle, as applied to sidewalks, is carried out in the manner usually adopted for carrying into effect police powers; by imposing upon the owner the *duty* of constructing the walk himself, and, upon his default in the performance of the duty, by doing the work for him, and imposing upon him the expense as a *penalty* for a *breach of duty*, which penalty is generally collected by suit.

It is true the courts do not, in all the cases just cited, expressly term this a police regulation; but the reasoning, I think, can only be justified on this ground. And in *Mayor v. Mayberry*, which seems to be the leading case in Tennessee, it is expressly declared not to be a tax, and the decision is professedly based upon the authority

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of Goddard's case, above cited. The view taken in *Bonsal v. Mayor of Lebanon*, above cited, is substantially the same.

In some of these cases, it is true — especially *Washington v. Mayor of Nashville*, and *Paxton v. Sweet* — the general language of the court, *arguendo*, is broad enough to sustain the power in question in the case before us. But the language must be understood *secundum subjectam materiam*, and can not be considered judicial authority beyond.

There would be great hazard in the attempt to bring within the field of police regulations cases not already recognized as such, and not, by any necessity, required to be so recognized. A power once admitted as a police power is hardly susceptible of accurate definition, and difficult to be restrained within any prescribed limits; and ought therefore, as far as possible, to be confined to the doing of those things which are necessary to the public welfare, and which, yet, can not be done at all, or without serious inconvenience, under specific recognized powers which are susceptible of restraint within known and defined limits.

But the raising of money for the grading and paving of streets, is not one of those public necessities which can not be conveniently met by the well-recognized power of taxation. The exigency falls directly within the appropriate exercise of this power. And to ignore this well-understood and defined power, and resort to a police power to accomplish the same end, would be like passing from terra firma into void space, where no sensible object exists by which to guide our course.

I am therefore unwillingly brought to the conclusion that the provisions of the charter here in question are in direct conflict with the ninth and fifteenth sections of the fifteenth article of the Constitution. I am unwillingly brought to this conclusion, because some months of delay must occur

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before the defect can be cured by legislation, and contractors may suffer, and necessary public improvements may be checked, during the interval. Besides, I think it quite probable — though we have no evidence of the fact — that owing to the peculiar circumstances of the property affected, and as the result of accident rather than the system, the sum imposed upon the complainant's property may not greatly, if at all, exceed the amount which might have been assessed under a legitimate system of taxation, which the Legislature had the power to adopt. But these considerations can have no weight in determining the question of power.

Albert Crane v. John O'Reiley.

The estate of one in possession of land under a contract of purchase is that of a tenant at will.

A clause in a contract of purchase, that on default by the purchaser the seller might declare the contract void, and the seller should thereafter be deemed a mere tenant at will, and liable to be proceeded against as such, confers no new rights, and is declaratory merely of the actual relation and rights of the parties.

The purchaser may, in such a contract, waive the right to a notice to quit on default.

Heard May 3d. Decided June 5th.

Error to Wayne Circuit, into which O'Reily had brought by appeal proceedings commenced against him by Crane, before a Circuit Court Commissioner, under chapter 150 of the Compiled Laws, to recover possession of lands.

The cause was tried in the Circuit Court without a jury, and from the finding of the Circuit Judge, it appears that on April 20, 1855, Crane entered into an agreement with O'Reily, signed by both, to sell to the latter certain premises in Detroit, for $1,350, payable, $50 down, and the balance with interest in nineteen equal quarterly instalments, on the payment of which, with all taxes, Crane was to convey to

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him the premises. The agreement then provided that "in case default shall be made by the party of the second part, his heirs, executors, administrators or assigns, in any of the conditions above stipulated to be performed by him, it shall and may be lawful for the party of first part, if he see fit, to declare this contract void, and to re-enter upon the said premises at any time after such default, without serving on the party of the second part, or other person holding under him, a notice to quit said land. And in case this contract shall be so declared void, the party of the second part shall be thenceforth deemed a mere tenant at will under the said party of the first part, and be liable to be proceeded against without notice to quit, under the provisions of an act regulating proceedings in cases of forcible entry and detainer, and the acts amending the same. And the party of the first part in such case shall be at liberty to sell the said land to any person or persons whomsoever, without being liable, in law or equity, to the party of the second part or any person claiming under him, for any damages in consequence of such sale, or to return any payments made on account of this contract; and payments that shall have been made may be held by the party of the first part as stipulated damages for the non-performance of this contract. And the party of the first part shall have the right to recover all damages sustained by reason of the holding over of said second party without permission.

"And it is further expressly agreed, that in case default shall be made by the party of the second part in any of the conditions stipulated to be performed by him, and the party of the first part shall see fit to declare this contract void, such declaration may be made by a brief notice thereof, addressed to the party of the second part, and deposited in the post office in the city of Detroit, Michigan, and this shall constitute a good and sufficient notice and service thereof."

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CRANE v. O'REILEY.

On March 31st, 1858, O'Reiley being then in arrears on the contract some $200, Crane, by a notice in writing, declared the same cancelled, and on December 31st following, commenced these proceedings to recover possession of the premises.

The Circuit Court decided that the commissioner had no jurisdiction of a case arising upon such a contract, and rendered judgment for O'Reiley, upon which Crane brought error.

G. Andrews, and *S. T. Douglass*, for plaintiff in error:

The relation of landlord and tenant is not essential to this proceeding:—27 *Miss.* 846; 2 *Swan*, 50; 4 *Rand.* 473; 5 *Ind.* 272. But if this contract be construed as an agreement to give the vendee possession until default, then its legal effect is a demise:—10 *Cush.* 259; 11 *Mass.* 533; *Brown on Stat. Frauds*, 28, 29. And the defendant would then be liable as one who holds over lands and tenements "after the time for which they are demised or let to him."

The defendant is liable as a tenant at will holding after the determination of his estate. His estate is that of tenant at will:—7 *Cow.* 751; 1 *Wend.* 422; 1 *M. & W.* 695; *Dwight v. Cutler*, 3 *Mich.* 572; 2 *C. M. & R.* 119. The parties have stipulated that it shall be, and the vendee expressly waives notice to quit:—19 *Pa. St.* 437; 12 *B. Monr.* 464; 11 *Pa. St.* 472; 1 *Green*, (*N. J.*) 40.

Ross & McEntee, for defendant in error:

No jurisdiction is given commissioners to oust vendees of lands for alleged breach of contract. The statute contemplates cases where the relation of landlord and tenant exists. It does not contemplate the trial of titles to land: 2 *Doug. Mich.* 377; 9 *Wend.* 227; 5 *Eng. L. & Eq.* 298; 5 *Wend.* 281. The vendee's holding is under the purchase, and not by demise:—7 *Barb.* 74; 20 *Barb.* 509;

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22 *Wend.* 605; 16 *Ill.* 145; 6 *Johns.* 46; 13 *Johns.* 489; 6 *Barb.* 128. An action for use and occupation will not lie against him: — 4 *Harr.* (*Del.*) 69; 16 *Ill.* 24.

The rights of vendee and vendor are analogous to those of equitable mortgagee and mortgagor. The vendee has a right of redemption: — 5 *Wis.* 598; 13 *Ark.* 534; 11 *Paige*, 353. But the jurisdiction here assumed is not to to give possession to the vendor merely, but to annul the contract.

MARTIN CH. J.:

It was held in *Dwight v. Cutler*, 3 *Mich.* 572, that when one enters into possession of land under a contract to purchase, his estate is that of a tenant at will. The agreement, therefore, under which he so entered is, in legal effect, a demise, although connected with the contract of sale. See also, *White v. Livingston*, 10 *Cush.* 259; *Cook v. Stearns*, 11 *Mass.* 533. Such being the rule of law, the clause in the agreement before us that, in case default should be made by the defendant in the performance of any of the conditions by him to be performed, it might be lawful for the plaintiff to declare the contract void, and to re-enter upon the land without serving upon the defendant a notice to quit, and that in case such contract should be declared void, the defendant should thenceforth be deemed a mere tenant at will, and be liable to be proceeded against as such, conferred no new rights upon the plaintiff, and created no new relation between the parties. It was merely declaratory of the relations and rights already existing under the law. The defendant had a right to waive notice to quit in the contract, as it was a merely personal right. This is not questioned.

The facts found in this case show a contract, a breach, and a notice, such as the contract requires, that the plaintiff declares it void; and he was consequently entitled to the remedy he seeks. The judgment of the Circuit Court

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is therefore erroneous, and should be reversed, and a new trial ordered.

The other Justices concurred.

Wilbur F. Storey & another v. Clinton G. Bird.

Where the maker and endorser of commercial paper are sued jointly under the statute, and one is defaulted and issue joined as to the other, it is competent for plaintiff to have damages assessed against the defaulted party, by the jury sworn to try the issue joined as to the other, and upon their verdict and assessment to proceed to a joint judgment against both.

Damages on affirmance of judgment.

Heard May 31st. Decided June 5th.

Error to Wayne Circuit.

Defendant in error brought suit in the court below, against William Hale, and Wilbur F. Storey, on a promissory note made by Hale, payable to the order of Story, and by him endorsed, and which was declared upon as the only cause of action. Story appeared and pleaded to the declaration, and Hale suffered default. A rule was afterwards entered, making the default adsolute, and referring it to a jury to assess the plaintiff's damages. A jury was subsequently impannelled to try the issue as to Storey, and assess the damages as to Hale, and upon their verdict and assessment, judgment was rendered for plaintiff against both. Defendants brought error, claiming that, by the default of one defendant and issue as to the other, the action was severed, and the subsequent proceedings must then be the same as if action had been brought separately against the maker and endorser; and also that in case of default in an action on a promissory note, the damages must be assessed by the clerk, and not by a jury.

Holbrook & Bishop, for plaintiffs in error.

D. B. Duffield, for defendant in error.

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STOREY v. BIRD.

MANNING J.:

It was argued that by the default of Hale, the maker of the note, to plead to the declaration, and the plea put in by Storey, the endorser, the joint proceedings against them were severed. We do not so read the statute, which would be of little avail if it was in the power of defendants, after the plaintiff had elected to proceed against them jointly, by any act of theirs to sever the proceedings. It is provided by § 4170 of Compiled Laws, that the plaintiff may in certain cases sever the proceedings. It does not, however, make it obligatory on him to do so, on the happening of the contingency in which it may be done, but leaves it optional with him to do it or not, as he may think most for his interest. The sole object of the section is to prevent unnecessary delay against a part of defendants, by reason of a defense interposed by others. The plaintiff might have proceeded against Hale alone, but it was for him to elect whether he would do so or not. He had a right to a joint judgment against both, if he could establish the several liability of each; and the order for the jury that tried the issue, on Storey's plea, to assess the damages on the interlocutory judgment against Hale, was correct. The judgment must be affirmed.

The other Justices concurred.

Duffield moved for the allowance of damages, under § 5612 of Compiled Laws, for the delay caused by the writ of error, which he claimed was brought on frivolous grounds.

THE COURT, not being satisfied of a want of good faith in bringing the writ, denied the motion.

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Constant Simmons v. Betsy Simmons.

In an action for breach of promise to marry, it is not necessary for plaintiff to prove that defendant was of full age when the promise was made.

In such an action it is not error to allow proof that defendant borrowed money of plaintiff, and renewed his notes therefor immediately before marrying another; as it is important for the jury to understand as fully as possible the mutual conduct of the parties during the existence of the contract, as well as the causes and circumstances attending the breaking off of the engagement.

Proof of the frequent intermarriage of the ancestors of the parties, who are cousins, and of the evil tendency of the marriage of relations in producing deformed or sickly and imbecile children, is incompetent—the contract of marriage not having been broken on any such ground.

Heard May 26th. Decided June 6th.

Error to Wayne Circuit. The case is sufficiently stated in the opinion.

W. P. Yerkes and *W. Gray* for plaintiff in error.

G. V. N. Lothrop for defendant in error.

CAMPBELL J.:

The defendant in error having obtained a judgment below against the plaintiff in error, for breach of promise to marry, it is alleged that errors occurred upon the trial below, *first* in not requiring proof that the plaintiff in error was of full age when he made the promise; *second*, in allowing proof that he borrowed money of the defendant in error, and renewed his notes one and two years upon his last visit to her, about a week before he married another; *third*, in excluding proof of the frequent intermarriage of the ancestors of the parties, who were cousins, and of the evil tendency of the marriage of relations in producing deformed or sickly and imbecile offspring.

We think the court below charged correctly on the question of infancy, which should have been proved if it existed when the contract was made. The case of *Beaubien v. Cicotte* [*ante*, *p.* 9] applies only to the *onus probandi* upon the competency of testators, and is confined

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entirely to such cases, for peculiar reasons not attaching elsewhere. Parties who are living, and *sui juris*, are able to produce testimony for themselves. And infancy is a substantive defense, requiring affirmative proof.

There was no error in allowing proof of the money transactions. In cases of this kind it is important for the jury to understand, as fully as possible, the mutual conduct of the parties during the existence of the contract, as well as the causes and circumstances attending the breaking off of the engagement. These transactions have some significance in showing the degree of confidence and intimacy existing, and have or may have a very decided bearing upon the view to be taken of the breaking of the promise. An engagement broken off suddenly and without warning, would very naturally create more pain and mortification than if ended under other circumstances; and if a jury were to regard this conduct concerning money matters as calculated, under the circumstances, to have caused additional ground of pain or grievance to the defendant in error, we think they would not be violating ordinary probabilities. We cannot presume that they included the debt in their estimate of damages.

Neither do we regard the exclusion of the evidence concerning the intermarriage of the relatives of the parties, and the physiological consequences referred to, as incorrect. It was undoubtedly competent to show the cousinship of the parties themselves, for all facts bearing upon their intimacy were material, and this would have some weight in explaining it. But plaintiff in error cannot be presumed to have been ignorant of these relationships during the continuance of his intimacy with defendant; and whether ignorant or not, he had means of knowing. Had he broken off the match upon any such avowed grounds, the jury, if they regarded the reasons as given in good faith, would be justified in considering the absence of a wanton and capricious disposition as less ag-

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gravating to the feelings of the defendant than an abrupt and causeless violation of the agreement. But it does not appear that any attempt was made to show that any of these matters were the real or ostensible causes for breaking the match, or were communicated as such to the lady, or her friends on her behalf. We do not think them admissible as independant facts. The law permits such marriages. The condition, health or prospects of the parties are not affected by them now any more than originally; and they are bound to consider such matters when they enter into their engagement. A change of health, or any other essential change in condition, may be in some cases a complete bar to an action of this kind; and so may the recent discovery of facts be a bar, or a cause for mitigation of damages, if the party acts upon it in good faith in receding from his contract. But a ground such as is here taken, is of no weight whatever, when it is not shown to have been the real and honest cause of the breach of engagement.

The judgment must be affirmed with costs.

The other Justices concurred.

William Tyler v. The People.

Manslaughter, committed by a mortal blow given on the River St. Clair, beyond the boundary line between the United States and the Province of Canada, and within a county in said Province, from which blow death ensued upon land, is not within the Crimes' Act of Congress of March 3d, 1857; and the Circuit Court of the United States has no jurisdiction of the same.

The term "navigable waters," as used in § 5044 of Compiled Laws, has the same meaning as in the Ordinance of 1787, and is not limited to waters where the tide ebbs and flows.

To enable this court to judge of the propriety of instructions to the jury in the court below, which instructions assume the existence of certain facts, the bill of exceptions must either contain the evidence of those facts, or a statement that there was such evidence.

In the absence of a treaty with Great Britain authorising it, the process of the District Courts of the United States sitting in Admiralty cannot be executed in Canadian waters.

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TYLER v. THE PEOPLE.

To authorize a court to declare a statute unconstitutional, it should be able to point out the part of the Constitution violated, and the infraction should be clear and free from a reasonable doubt.

There is no constitutional objection to the provision (§ 5944 of Compiled Laws) for the prosecution and punishment here of a homicide committed by a mortal blow, &c., out of the state, from which death results within it.

Heard May 1st. Decided June 6th.

Error to St. Clair Circuit.

The pleadings in this case may be found in 7 Mich. 162. Subsequent to the decision of the questions there passed upon by this court, the plaintiff in error put in a plea of Not Guilty, was tried, convicted of murder in the second degree, at the November term, 1859, and sentenced to six years imprisonment in the state prison. Exceptions were filed, and a writ of error taken to this court.

From the bill of exceptions it appears that the defendant requested the court to charge the jury, *first*: "that if they believed, from the evidence introduced tending to show it, that the mortal wound of which the deceased, Henry Jones, died in the county of St. Clair, was given by said William Tyler on the river St. Clair, and not within any county of the state of Michigan, that then said mortal wound was not given on the high seas, or any other navigable waters, within the meaning of section eight of chapter one hundred and ninety-two of the Compiled Laws of the state of Michigan; that there was no evidence in support of the second count of said indictment; that such offense proved was not cognizable in said Circuit Court for the County of St. Clair, and that the prisoner must be acquitted." *Second:* "that if they believed, from the evidence introduced tending to show it, that at the time of the shooting of said Henry Jones, as charged in the indictment, the defendant was a deputy of the Marshal of the United States for the district of Michigan, and had in his possession and exhibited at said time, a writ of attachment of said brig Concord, duly issued under the seal of the District Court of the United States for the District of Michigan, sitting in Admiralty, and that said defendant

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at said time, was avowedly attempting to execute said writ, as such deputy Marshal, by taking possession of said brig, unmoored and in motion, or riding at anchor in that part of the river St. Clair lying on the Canadian side of the boundary line between the United States and the province of Canada,—that said brig was an American vessel, and that said Henry Jones was the master of said brig, and was at said time forcibly, and with deadly weapons, resisting and intending to resist said defendant, and said writ, at all hazards; that then said shooting and killing was excusable homicide, and the prisoner must be acquitted." *Third:* "that if they believed, from the evidence introduced tending to show it, that the said mortal wound was given outside the state of Michigan, and not on the high seas or waters affected by the ebb and flow of the tide, the court has no jurisdiction under either count of the indictment, and the prisoner must be acquitted." All which instructions the court refused to give, and defendant excepted.

The errors assigned were, *First*: That the Circuit Court determined the two questions of law held by said court to arise upon the plea of *autre fois convict*, replication and demurrer, and the issue of law so joined, in favor of the People. *Second*: That the Circuit Court overruled the demurrer to the replication. *Third*: That, whereas, the construction of the said statute of the United States, of March 3d, 1857, was drawn in question by the said plea, replication and demurrer, and a right, privilege and exemption was specially set up and claimed by said William Tyler, under the said statute of the United States, by his said plea of *autre fois convict* and demurrer, the said Circuit Court decided against said right, privilege and exemption, so claimed as aforesaid, whereas, by law, said court ought to have decided in favor of the same;" *Fourth, fifth* and *sixth:* That the Court erred in refusing to give to the jury the three several instructions prayed.

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Walker & Russell, for plaintiff in error:

The matters arising upon the first and third assignments are not discussed, because it is not expected that the court will reconsider the opinion in 7 *Mich.*

1. We contend that there is no jurisdiction in the St. Clair court, on the face of the indictment.

There is no allegation of the nationality of the brig Concord, or of Tyler, or of Jones, or of the relation of either of them to the brig. Aside from Comp. L. § 5944, there is no foundation for the first count, as is shown under point 3d below; and this statute is to be construed as strictly as the U. S. statutes, considered by *Campbell J., Tyler's Case*, 7 *Mich. and cases cited.*

Offenses committed by foreigners upon American or foreign vessels, or by Americans upon foreign vessels, are not against the dignity of Michigan, and the death within her limits is not an offense.

2. The first instruction prayed was improperly refused. That part of the St. Clair river where the wound was given in this case, is within none of the descriptions in the statute. The word "navigable" does not cover it. It *is a technical word of the common law, used with high seas, in a penal statute, borrowed from English legislation.*

When legislation is upon subjects relating to courts and legal proceedings, or is borrowed from old statutes, we are to consider the Legislature as speaking technically in respect to the subject matter, and employing a given word in its established sense: — *Dwarris Stat.* 670, 693, 696: *Sedgwick Stat. Law*, 261, 262, 263; 6 *Mod.* 143; *Campbell J.*, 7 *Mich.* 211.

The language is "high seas or any *other* navigable waters;" *i. e.*, any waters of like character with the sea; salt and tide — bays, creeks and rivers, connected with the sea: — 7 *Mich.* 211; and see *Sedgwick*, 437.

Penal statutes are strictly construed, *i. e.*, "when there is a doubt, the judiciary will not so construe as to in-

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flict a punishment which the Legislature *may* not have intended:" — *Sedgwick*, 327; *see, also*, 324, 336, 333.

If it be said that the words "within the state," apply to the phrase "navigable waters," and that, therefore, fresh waters must have been intended, we reply that those words apply to the word *land*, just previously used, according to grammatical construction; but, if not, they apply to "high seas" as much as to "navigable waters," and there are no high seas in the state.

It is no answer to say that the word "navigable," in § 21, 1 *Comp. L.* 194, referring to streams in this state, is not made use of in the common law sense, as well as in Art. 18, § 4 of the Constitution. The word in these instances means simply floatable streams: — See *Moore v. Sanborne*, 2 *Mich.* 519. The word "land" covers such streams. The common law knows no *waters*, in description of locality, except salt and tide.

And it has been expressly held by this court, that the Detroit and St. Clair rivers are land covered by water, susceptible of private ownership, and, although public streams, yet not navigable in the legal sense: — *People v. Tyler*, 7 *Mich.*; *Lorman v. Benson*, *ante p.* 18.

3. Aside from the statute, the St. Clair court would have no jurisdiction if the injury was inflicted out of the county. This statute, and § 7 previous, were copied from the Mass. act of 1795, c. 45: — 2 *Pick.* 550, 559. That was from stat. Edw. 6, passed before the settlement of this country: — *Ibid.* 558; 1 *Russ. Cr.* 101, 554, *citing* 9 *Geo.* 4, *c.* 31.

The second count alleges that the wound was given in St. Clair county, at Port Huron. Under the instruction prayed, as to the locality of the shooting, there would be no evidence in support of that count, and there being none under the first count, unless the St. Clair, in Canada, be navigable waters, the instruction prayed should have been given.

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4. The plaintiff in error had a right to arrest the "Concord" in the waters of the St. Clair on the Canadian side of the boundary line, the process being regular on its face. By the law of nations, and by the treaty of 1842, the right of passage with vessels was secured; by the Constitution of 1789, and the act of 1845, the United States acquired admiralty jurisdiction over the lakes and connecting waters — not common law civil jurisdiction, but the right to take cognizance of matters of contract and tort concerning vessels, the instruments of commerce; and, as a necessary consequence, the right to take possession of vessels, in exercising jurisdiction. To arrest an American vessel in the waters in question, is not the exercise of sovereign power over the territory of Canada, but over movable parts of our territory, which, on being moved into these waters, common for passage, and under admiralty jurisdiction, do not lose their subjection to our process, by becoming subject also to the foreign law. The deputy Marshal is invested with official power while upon an American vessel in admiralty waters, although those waters may be subject to the absolute territorial jurisdiction of Canada. Border navigable waters are like the high seas for practical maritime purposes. Territorial jurisdiction over the lakes is mere abstraction. Who can give any county, state or province, as the scene of the battle of Lake Erie?

For such purposes these waters are common, and both Canadian and U. S. jurisdiction may subsist together over the same vessels in some sort, as state and Federal jurisdiction subsist over the same vessels on this side. The U. S. authority, of course, can be exercised only as against private persons in possession of our vessels, and could not interfere with local authority.

This power to take the *ship*, is a highly different thing from the power to arrest a criminal. Our commerce can not be "*regulated*" unless the power to regulate may follow the vessel wherever it has a right of passage, and take

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possession of it, *as against our own citizens;* nor can the admiralty jurisdiction be fully exercised, unless the vessel, *as against our own citizens*, may be followed by its process.

Admiralty jurisdiction on the lakes and connecting waters, is practically worthless, if a vessel may elude the Marshal by gliding past the uncertain and imaginary boundary line; and embarrassing uncertainties as to the locality of a given occurrence upon this or the other side, would constantly arise. Congress contemplated no such absurdities.

J. M. Howard, Attorney General, for the People:

1. The common meaning of the word *navigable* is the sense in which it is employed in the statute:—See *Ordinance of* 1787, *Art.* 4; 1 *U. S. Stat. at Large*, 468; *Ibid.* 491; 2 *Ibid.* 235, 279, 666, 703; 3 *Ibid.* 349, 492, 546, 756; *Comp. L. pp.* 194, 195; *Const. of Mich. Art*, 18, §4; 6 *Barb.* 263; *Ang. on Watercourses*, 206; 3 *Caines*, 318; 17 *Wend.* 572; 17 *Johns.* 209; *Lorman v. Benson, ante, p.* 18 *Moore v. Sanborne*, 2 *Mich.* 525.

2. The question whether, admitting the mortal stroke to have been given in Canadian waters, and that death ensued from it in this state, the Legislature have power to provide for the punishment of the offense here, depends on whether the power is prohibited by the state Constitution.

The rule in construing a state constitution, is that the Legislature possesses plenary powers, unrestricted except by the instrument itself; and that the presumption is in favor of the validity of a particular statute until it plainly appears from the Constitution itself that the Legislature had no authority to pass it:—11 *Penn.* 61; 1 *O. S. R.* 77; *People v. Collins*, 3 *Mich.* 348, 349, 354, *Judge Green's opinion; Ibid.* 404, 405, *Judge Martin's opinion;* 15 *N. Y.* 543, 545; *Sears v. Cottrell*, 5 *Mich.* 256.

Our present Constitution certainly contains no prohibition to pass such an act; and the Legislature possesses

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all the power that the British Parliament possess over the subject.

By the common law, when a mortal blow was given in one county and death ensued in another, the offender, according to Blackstone, might be tried in either, "because no complete felony was done in any one of them:"—(4 *Bl. Com.* 303, 304); though Bishop (1 *Crim. Law* § 554) thinks the courts anciently *doubted* whether, if the blow was inflicted in one county and death from it followed in another, the offense could be prosecuted in either. But by statute of 2 and 3 *Edward* 6, *Ch.* 24, this doubt, if there was one, was removed, and it was enacted that in such a case the offender was indictable in the county where the party died:—*Starkie's Crim. Pl.* 7; *Hawk. B.* 2 *Ch.* 29, § 49.

This ancient statute [1550], has been re-enacted in this country by almost all the state legislatures.

So much for the question between *counties*. But the English Parliament, by the statute of 2 *Geo.* 2, *Ch.* 21, went much further, and enacted that "where any person feloniously stricken or poisoned at any place *out of England*, shall die of the same in England; or being feloniously stricken or poisoned in England, shall die of such stroke or poisoning out of England, an indictment thereof, found by the jurors of the county in which either the death or the cause of death shall respectively happen, shall be as good and effectual in law, as well against principals as accessories, as if the offense had been completed in the county where such indictment shall be found:"—*Starkie's Crim. Pl. p.* 10, 1*st. Am. Ed.;* 4 *Bl. Com.* 330.

By 9th *Geo.* 4, *Ch.* 31, § 7, any *British subject* charged in England with murder or manslaughter committed on land, whether "*in the King's dominions or without*," may be tried and punished in any county of England in which the Lord Chancellor shall, by his commission, direct, in the same manner as if the offense had been committed

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in such county; and by section 8 of the same act, it is enacted that "*where any person* being feloniously stricken, poisoned or otherwise hurt, upon the sea, *or any place out of England*, shall die of such stroke, poisoning or hurt in England, or being feloniously stricken, poisoned or otherwise hurt at any place in England, shall die of such stroke, poisoning or hurt, upon the sea, or any place out of England, every offense committed in respect of any such case, whether the offense shall amount to the offense of murder or of manslaughter, or of being accessory before the fact to murder, or after the fact to murder or manslaughter, may be dealt with, enquired of, tried, determined and punished in the county or place in England in which such death, stroke, poisoning or hurt shall happen, in the same manner, in all respects, as if such offense had been wholly committed in that county or place:"—4 *Bl. Com.* 305, *Note* 9, *ed. of* 1844, *N. Y.; Arch. Crim. Pl. p.* 380.

In *Azzopardi's case*, 1 *C. & K.* 203, which occurred in 1843, the fifteen judges held that, under section 7 of the act, the murder of an *alien* by a British subject at Smyrna, was cognizable in the Central Criminal Court in London.

In *Helsham's case*, 19 *Eng. C. L. R.*, the prisoner was indicted under the same section, and convicted of murdering Lieut. Crowther, at Boulogne in a duel.

The statute of 33 *Henry* 8, *Ch.* 23, also provides for the indictment and punishment of *British subjects* who commit murder out of the King's dominions:—1 *Taunt.* 26; 1 *Russ. & Ry.* 294.

But it is obvious from the language of the 8th section of 9 *Geo.* 4, *Ch.* 31, and from the act of *Geo.* 2, that Parliament was not wholly governed by the consideration that the offender was a British subject, owing allegiance to the crown; but deemed it sufficient to constitute the crime that the blow or poisoning was without those dominions, and the death within; or that the blow or

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poisoning was within, and the death without. The former case is plainly one of those embraced in our own statute, and precisely the one at bar. The essence of the offense is that the fatal violence, though committed abroad, attaches to and accompanies the victim into the domestic jurisdiction, and there destroys his life. The murderous intent and the murderous act are contemplated as being united, and as continuing upon the victim after he has arrived within the jurisdiction of the government trying and punishing the offender. The unlawful death is really the crime which he commits, although not personally present. Surely there is nothing in the state Constitution prohibiting the Legislature from passing an act to meet such a case. The real crime itself — *murder* — might otherwise go unpunished; the mere giving of the blow or administering of the poison being an offense of a far inferior grade, and calling for a far lighter penalty. The statute is no novelty: — *R. S. Mass.* 746; *R. S. Wis.* 1858, *p.* 978.

And even without the aid of any such statute, courts hold that where a crime has been begun in one state, and completed in another, the offender is amenable to the laws of the state where it is completed: — 3 *Pick.* 204; 6 *East*, 583; 3 *Denio*, 185, 206; 1 *Comst.* 173; 2 *Sumn.* 482; 1 *Leach*, 432; 4 *Dall.* 426; 1 *Wash.* 463; 7 *S. & R.* 469; 3 *Conn.* 1.

That a crime commenced in one county, and consummated in another, is punishable in the county where completed, has been too often determined to require the citation of authorities: — 21 *Wend.* 509, 527; 2 *Barb.* 427, 429; 1 *Bish. Cr. L.* § 556; *Starkie Cr. Pl.* 10.

The statute creates a new offense not perhaps known to the common law; — the offense of being the author of the death of a fellow-being, unlawfully and against his will, in this state, by violent means employed out of it. The death was the consummation of the crime, and was the immediate result of the mortal blow given in another

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jurisdiction. The fatal operation of the wound upon the person of the deceased, while he languished with it, was the same as to criminality as would have been a dose of poison administered at the same place; and it is impossible to see the difference in principle between this case and the cases above cited, of crimes begun in one country state, or county, and completed in another.

3. The bill of exceptions nowhere shows that Jones had any deadly weapon, or that Tyler was attempting to serve his process; and the second instruction asked was therefore inapplicable to the facts of the case. To make a refusal to give an instruction, as to what would be the law under a given state of facts, error, the bill of exceptions must show that there was evidence actually given to the jury conducing to prove that state of facts:—6 *Cranch*, 226; 4 *Cranch*, 62; 1 *Stew. & Port.* 71; 5 *Ibid.* 330; 8 *Johns.* 495; 2 *Pet.* 1; 9 *Wend.* 296.

When the bill does not purport to set out all the evidence, it will be presumed that the evidence, if set out, would sustain the charge:—29 *Ala.* 322; 4 *Ind.* 266.

But is the law such as it is claimed to be in this prayer?

It implies that both being armed with deadly weapons, Tyler persisting in his unlawful attempt to seize the brig, and Jones endeavoring with force and deadly weapons to prevent it, the former had the right to slay the latter. The bill does not show what the actual circumstances were; what use Jones made of the weapon he had, nor whether Tyler retreated "*to the wall*," as the phrase is; *i. e.*, made an honest effort to escape the threatened blow from Jones by retiring from the spot; nor whether Jones used the weapon in such a way as to warrant Tyler in discharging the pistol; nor, even, whether he made any assault at all with his weapon upon Tyler. These important elements in the question are all omitted in the bill of exceptions.

Now, Jones having the right to defend his property

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against the attempt to seize it, made by Tyler, it must, in order to show that the homicide committed by Tyler was excusable or justifiable, appear that he was actually attacked and assaulted by Jones with a deadly weapon, and that he was in such imminent danger of being put to death, or receiving some great bodily harm from this assault, that to prevent it he was under the instant and unavoidable necessity of shooting him down. If there was a way of escape open, he was bound to *retreat*, and might not kill his assailant without incurring the guilt of manslaughter, at least: — *Fost.* 277; see *Hale's Pl. C.* 479, 480; 2 *Bish. Crim. L.* §§550, 564, 566, *and note* 2; 2 *Comst.* 193.

MANNING J.:

The errors assigned in this case present the following questions for the decision of the court: *First*, Is the plea of a former conviction a bar to the prosecution: *Second*, Had the Circuit Court cognizance of the offense charged in the first count of the indictment: *Third*, Did the court err in refusing to charge the jury that, if Jones died in the county of St. Clair, of a wound inflicted by the prisoner on that part of the St. Clair river not within the limits of the state, (as there was no evidence to support the second count in the indictment) they should acquit the prisoner. And *Fourth*, In refusing to charge that, if the jury should find the prisoner was a deputy of the Marshal of the United States, and was in the act of serving process, &c., as stated in the request to charge set out in the bill of exceptions, they should acquit the prisoner.

The first question was decided by this court when the case was before us on questions reserved: — *People v. Tyler*, 7 *Mich.* 161. We then held, and we have seen no reason since to change our opinion, that the Circuit Court of the United States for the district of Michigan, in which the prisoner was tried and convicted, had no jurisdiction of the offense

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under the act of Congress entitled "An Act in addition to An Act more effectually to provide for the Punishment of Crimes against the United States, and for other purposes," approved March 3, 1857, and that the prisoner's plea of a trial and conviction in that court was therefore no bar to the present indictment.

The next question depends on the construction to be given to § 5944 of Compiled Laws, which is in the following words: "If any such mortal wound shall be given, or other violence or injury shall be inflicted, or poison administered, on the high seas, or on any other navigable waters, or on land, either within or without the limits of this state, by means whereof death shall ensue in any county thereof, such offense may be prosecuted and punished in the county where such death may happen."

It is insisted by the prisoner's counsel, that the words, *navigable waters*, as they are here used in connection with the high seas, should be understood as meaning such rivers or waters only as are navigable from the sea, and in which the tide ebbs and flows; or, in other words, tide waters. We do not feel warranted in giving to them so restricted a meaning. They are used in a statute relating to offenses against the state, and their punishment. They are not used in connection with admiralty law, or courts of admiralty; and as the state has nothing to do with such laws or courts, and there are no waters of the description referred to within her limits, or within several hundred miles of the state, it is quite evident the Legislature must have used the words in a much broader sense, and as including waters in which there is no ebb and flow of the tide. We doubt whether they were ever used in the laws of Michigan in the restricted sense imputed to them, as there is nothing within the limits of the state, or contiguous thereto, to which they could in that sense be made to apply. But there are large lakes and rivers lying partly within her limits, and partly within a foreign state, to which we think

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they do apply. They are used in the section under consideration (on which the first count of the indictment was framed) in the sense, we think, in which the same words are used in the ordinance of '87, which provides that the *navigable waters* leading into the Mississippi and St. Lawrence shall be public highways. The Massachusetts statute from which it is said our statute was taken, does not contain these words. We are therefore of opinion the Circuit Court for the county of St. Clair had cognizance of the offense charged in the first count of the indictment.

The construction we have given to the statute disposes of the third question. Whether there was evidence or not to support the second count, which is in the usual form, it would have been error in the court to have charged as requested.

Something was said on the argument as to the power of the Legislature to enact such a law; but as it was not made a point by the prisoner's counsel, we should not now notice it were it not that our brother Campbell, differing with a majority of the court, holds the statute to be unconstitutional. We think it clearly within the scope of the legislative power. We know of no constitutional inhibition; no part of the Constitution with which it comes in conflict:—In *Sears v. Cottrell*, 5 *Mich.* 251, we stated in substance, if not in words, that to warrant us in declaring a statute unconstitutional, we should be able to lay our finger on the part of the Constitution violated, and that the infraction should be clear, and free from a reasonable doubt. We still adhere to the views then expressed. The expediency or policy of the statute has nothing to do with its constitutionality; and if it was a legitimate subject of inquiry and consideration in determining the constitutional question, we should not hesitate in the present instance to declare in its favor; for the crime, though commenced in Canada, was consummated in Michigan.

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The shooting itself, and the wound which was its immediate consequence, did not constitute the offense of which the prisoner is convicted. Had death not ensued, he would have been guilty of an assault and battery; not murder; and would have been criminally accountable to the laws of Canada only. But the consequences of the shooting were not confined to Canada. They followed Jones into Michigan, where they continued to operate until the crime was consummated in his death. If such a killing did not by the common law constitute murder in Michigan, we think it the clear intent of the statute to make it such, to the same extent as if the wounding and the death had both occurred in the state.

The only remaining question is, whether the court erred in refusing to charge that, if the jury "believed from the evidence introduced, tending to show it, that at the time of the shooting of the said Henry Jones, as charged in the indictment, the defendant was a deputy of the Marshal of the United States for the district of Michigan, and had in his possession and exhibited at said time, a writ of attachment of said brig Concord, duly issued under the seal of the District Court of the United States for the district of Michigan, sitting in Admiralty, and that said defendant at said time was avowedly attempting to execute said writ, as such deputy Marshal, by taking possession of said brig, unmoored and in motion, or riding at anchor in that part of the river St. Clair lying on the Canadian side of the boundary line between the United States and the province of Canada; that said brig was an American vessel, and that said Henry Jones was the master of said brig, and was at said time forcibly and with deadly weapons resisting and intending to resist said defendant, and said writ, at all hazards; that then said shooting and killing was excusable homicide, and the prisoner must be acquitted."

The court was right in refusing to charge as requested, for two reasons:

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First: Because the request assumed what does not appear from the bill of exceptions, viz: that the prisoner was a deputy of the Marshal; that he at the time exhibited the writ, and was in the act of executing it; and that Jones forcibly, and with deadly weapons, resisted the execution of the writ. There is no evidence in the bill of exceptions tending to prove these facts, nor any statement that there was evidence before the jury tending to prove them. Without the evidence itself, or a statement in the bill of exceptions that there was such evidence, we can not determine the propriety or impropriety of the request; or whether the charge, if made, would or would not have anything to do with the merits of the case, or be an abstract principle of law, wholly foreign.

Second: Because the writ did not authorize the seizure of the vessel in Canadian waters. The process of a court is if no force or validity beyond its territorial jurisdiction. Validity may be given to it by statute, or a law of the state, coextensive with the state, but no extra territorial validity whatever can be given to it without the consent of the sovereignty of such territory; and we know of no treaty between the United States and Great Britain authorizing the service of the writ in Canada.

The judgment must be affirmed.

MARTIN CH. J., and CHRISTIANCY J. concurred.

CAMPBELL J.:

I concur with my brethren in adhering to the views formerly expressed upon the questions reserved, when this case was presented to us heretofore; for the reasons given in the reported decision in 7 *Mich.* 161. I am also of opinion that process can not legally be served in a foreign jurisdiction.

But I am unable to discover any authority, in the state of Michigan, to punish an offense like the one here charged upon the plaintiff in error. The record raises expressly

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the question whether the Circuit Court for St. Clair county had jurisdiction to punish such an offense. Counsel for the prisoner based his argument mainly upon the want of power in this state to punish acts committed abroad by any but its own citizens; and, assuming that, as to them, it might exist, claimed that no case was made out by the indictment on that hypothesis. My brethren sustain the act as applicable to such an offense as it describes, committed by any one. As the record can only be sustained by overruling the objections and errors assigned, the sufficiency of which depends on their own legal character, it becomes necessary to inquire into the validity of the statute, as well as its construction. This is the more important, as this case is the first which has called for any decision upon it, and must stand as a precedent.

Section 5944 of the Compiled Laws (which is the section under which this prosecution is had) is found in a chapter devoted to a number of miscellaneous provisions concerning criminal prosecutions; and is as follows: "If any such mortal wound shall be given, or other violence or injury shall be inflicted, or poison administered, on the high seas, or on any other navigable waters, or on land, either within or without the limits of the state, by means whereof death shall ensue in any county thereof, such offense may be prosecuted and punished in the county where such death may happen." Tyler is charged with having wounded Jones in Canadian waters, whereof he died in this state.

It will be observed that this statute neither creates nor defines any offense. Its original source was an English statute which, like the Massachusetts statute from which ours was more immediately copied, has never been construed. Neither of these statutes imposes any punishment whatever. Unless there is to be found somewhere else upon the statute book some offense which corresponds with this description, the whole section remains inopera-

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tive. We must therefore look into the other statutes of the state to determine what punishable offenses this statute embraces.

No common law offense can be punished in this state by more than two years imprisonment in the county jail, or more than two thousand dollars fine, unless an express provision is made by statute for a different punishment: *Comp. L.* § 5958.

The only homicides punishable under our laws are murder and manslaughter. Manslaughter is punishable by that specific name; the statute neither defining nor grading it, but punishing the common law offense known as such: — *Comp. L.* § 5720. Murder is divided into two degrees, but the offense is not defined except by its common law name; and all that the statute does in regard to it is, to divide murder at common law into classes, punishable according to their several degrees of malignity: *Comp. L.* §§ 5711, 5712. Nothing is murder under this statute which was not murder at common law: — *People v. Potter*, 5 *Mich.* 1; *People v. Scott*, 6 *Mich.* 287. And if Tyler's offense was not an offense at common law, I do not very well perceive how it can be justiciable in any of our courts. For there can be no power to try for an act which is not punishable. Before inquiring, therefore, into any other considerations of construction or validity, it is important to ascertain what was murder within the common law definitions.

The common law definitions all agree in substance. Hawkins defines murder to be the wilful killing of any *subject* whatsoever, through malice aforethought, whether the person slain shall be an Englishman or a foreigner: — 1 *Hawk. P. C.*, *B.* 1 *Ch.* 31 § 3. And the other authorities either use the same language, or define it as the malicious killing of "*any person under the King's peace.*" *Rosc. Cr. Ev.* 690; 1 *East. P. C.* 214; 3 *Inst.* 47; 1 *Russ. Cr. L.* 482.

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The slayer must also, under all the authorities, owe temporary or permanent allegiance to the sovereign. If a native of the realm, his allegiance is held to follow his person everywhere; and it has been held that the common law definition of murder would attach to the act, whether within or without the realm, if committed by one owing allegiance upon another owing it. The term "*under the peace of the King*," signifies *under the protection of the King*, which is supposed to embrace his subjects everywhere, but can only act upon foreigners within his dominions:—See *Rex v. Sawyer*, 2 *C. & K.* 101; *Regina v. Serva*, 2 *C. & K.* 53; *Rex v. Helsham*, 4 *C. & P.* 394; *Rex v. Mattos*, 7 *C. & P.* 458; *Depardo's Case*, 1 *Taunt.* 26. The slaughter of an Englishman anywhere, by an Englishman, was an offense against the Crown, because depriving it of a subject. The slaughter of a foreigner within the realm was a direct invasion of the peace. But the slaughter of a foreigner abroad, and out of the protection of the King, attacked neither his peace, nor dignity or prerogative, and was no offense at common law. And so closely did the idea of protection attach to the crime that, at common law, and until a statute interfered, it was said that "if a man be attaint in a *præmunire*, whereby he is put out of the King's protection, the killing of him was held not homicide:—1 *Hale P. C.* 433. And the reason is given in *Viner's Abr.* "*Murder*, 3." "If a man kills one who is attainted by *præmunire*, this is not Felony, for he is out of the King's protection, which is the same as if he was out of the realm and power of the King."

The definitions of the common law applicable to murder are broad enough to cover very nearly every such killing of malice aforethought as would come, by the broadest construction, within the power of the British government to punish at all. And, accordingly, the various statutes which have been passed have not defined offen-

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ses, but merely prescribed the place of trial, and the courts to have cognizance of the offenses. And where a crime has been committed, punishable by the sovereignty, the selection of a place of trial is not a question of power, but merely one of convenience. Those doctrines which required a particular venue for common law prosecutions, had nothing to do with the definition of the crime of murder. They merely regulated the mode of prosecution. And therefore when the common law courts could not act, according to their ancient practice, Parliament interfered — not by defining new offenses, but by furnishing means to try what were already within the common law definitions. A want of attention to this has sometimes led to confusion in the definition of offenses.

The old rule requiring every offense tried in the common law courts to be inquired of in the county where it occurred, originated in the peculiar constitution of the early juries. They were not selected merely to hear evidence and pass upon it. They were witnesses, as well as triers; and were supposed to act on knowledge derived in their own vicinage. Where an inquiry was necessary into matters occurring in different counties, there was no adequate machinery for conducting it. The rule survived its reason; and has been maintained since for convenience rather than necessity; and may therefore be modified upon proper occasion. But, formerly, if a fatal blow was given in one county, and death happened in another, the homicide could not be within the knowledge of the jurors of either county; those who could speak as to the blow having no means of ascertaining the death; and *vice versa*. But it was settled that, by carrying the dead body into the county where the wound was given, so that death could be shown by view, the offense might be tried there: 1 *Bish. Cr. L.* § 554, *and citations*. And although it may be regarded as doubtful, there are nevertheless very high authorities for saying that, at common law (but probably

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when jury trials became more improved) a trial might always be had in the county where the mortal blow was given, "*for that alone is the act of the party, and the death is but a consequence:*—1 *East P. C.* 361; 1 *Hale P. C.* 426; 1 *Bish. Cr. L.* § 454. And it was also necessary at common law, originally, in a case of this kind, to remove the body to the county where the injury was given, in order to have the coroner's inquest:—1 *East P. C.* 361; 1 *Hale P. C.* 426; 2 *Hale P. C.* 66. The office of a coroner being to make inquisition concerning sudden or violent deaths, and he being required to act upon a view of the body, the rule referred to has a very strong bearing on what really, in the eye of the law, constitutes the offense in murder; a subject to which I shall refer presently in another connection. The statute of 2 and 3 *Ed.* 6 *c.* 24, provided that, in case of a mortal injury in one county, followed by death in another, an indictment found in the county where death happened should be "as good and effectual in law as if the stroke or poisoning had been committed and done in the same county where the party shall die, or where such indictment shall be so found:"—1 *East P. C.* 362. This statute originated the practice of indicting at the place of death; and an idea has hence sometimes gained currency that the place of death was the place of the offense; an idea which the language used is not at all calculated to convey, and which is inconsistent with various rules to which I shall refer, in addition to what has already been mentioned.

The statutes of 28 and 33 H. 8 provided for offenses committed at sea, or abroad, and have been repeatedly held to create no new offenses, and to punish none but those under temporary or permanent allegiance.

In the hearing on the questions reserved we had occasion to consider the construction of various American statutes, which, although using words of unlimited meaning, have always been confined in their operation to offenses

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committed by persons over whom we have an undoubted jurisdiction. It is unnecessary to repeat the views I then expressed. See 7 *Mich.* 161.

These rulings of the English and American authorities have all been made in clear recognition of the law of nations, which allows no country to punish offenses not against its own peace or sovereignty; unless they are offenses against the whole human race, which would after all come within the same reason. No offense committed abroad, except by a citizen or subject of a country, can, upon any rule of law recognized in our jurisprudence, be held punishable by that country: — 1 *Bish. Cr. L.* § 581; *Wheat. Int. L.* (*Ed. of* 1855) 174, 175.

If this statute is construed to punish an act done abroad (and, under the construction which my brethren put upon it, I must regard it as so doing), then it is void, not because in violation of any specific clause of our state Constitution, but because all of our constitutions are subject to the law of nations, which is expressly recognized by the Federal Constitution, and which confines the power of every civilized commonwealth within fixed bounds. Even the so-called omnipotence of Parliament has never been held to transcend these limits. Not only is this evidenced by the settled rules of construction which confine the operation of statutes within these principles, but *Comyn* expressly enumerates among "What things the Parliament can not do," that "*it can not do any thing out of the limit of its jurisdiction*:" — *Com. Dig.*, "*Parliament, K.*" Our limits are fixed by our Constitution in conformity to treaties with Great Britain.

If we should concede that the state of Michigan has all the powers of an independent nation, the power to punish Tyler for any offense committed in Canada must depend upon his citizenship, which must be averred; and to punish him for a common law homicide, the citizenship of Jones is equally necessary to be averred, in terms, or by language equivalent: — *Rex v. Helsham*, and *Rex v. Sawyer*, *supra*.

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But I do not conceive that any state of this Union has any such extra territorial power over its citizens. This power is inseparably connected with the duty of protection. This duty can not, under our Federal Constitution, be exercised abroad by the individual states. It belongs to the power which can levy troops, maintain navies, declare war, and hold diplomatic intercourse with other nations. This every state in the Union is forbidden to do. Even within the Union, the citizens of one state are protected in another by virtue of the Federal Constitution. Their own state can not protect them. And upon no principle can its peace and dignity be considered as invaded where, if its own citizens are aggrieved, it has no right, as a state, to communicate with the public authorities at all, whether to supplicate or to demand their rights.

I have referred to this doctrine, that no state can extend its criminal laws beyond its own jurisdiction, because that is precisely what I think this statute has attempted, if reaching this case. But my brethren, who I presume do not deny the doctrine, regard this offense as a domestic, and not as a foreign offense. Can it be so regarded?

If it be a domestic offense, it is made so by the single fact that Jones died in Michigan. It is not pretended that Tyler did any violence to him in this state. But my brethren hold, that the death not only completed the offense or crime of murder, but, as a consequence of Tyler's act, served to bring him constructively into a violation of our laws, within our jurisdiction. In other words, to maintain this view it must be claimed that the murder was committed, in law, in St. Clair county, because Jones died there. For our statutes punish the whole crime, and not a part of it, even if it be divisible; and they punish it, if at all, as murder. The offense mentioned is the blow or wound followed by death; and not the death, or the languishing and death, alone. And we can not very well conceive of a murder at common law,

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or at all, which does not include the active agency of some one in the infliction of that injury which is the cause of death.

The doctrine of constructive presence has no applicability to such a case as this. All that it amounts to is, that the crime shall be regarded as committed where the injurious act is done. A wounding must of course be done where there is a person wounded, and the criminal act is the force against his person. That is the immediate act of the assailant, whether he strikes with a sword or shoots a gun; and he may very reasonably be held present where his forcible act becomes directly operative. But when the bullet rests, or the sword is withdrawn, he ceases to act. And the suffering which the wounded person subsequently undergoes, is not an act, but a mere consequence; a distinction which is real and essential, and can not be disregarded. The death of the assailant before his victim, would not stop the progress of the latter's lanquishing, nor would the hearty repentance and earnest efforts of the guilty man to bring about a cure, remove his liability, should the hurt person die. Yet it would be absurd to say he continued to have a criminal intent, and that every new pang of the sufferer was a new criminal act of guilt. There is but one guilty act, which consists of the blow or wounding, inflicted with malicious intent; and the suffering and death are both merely effects of that one act. There can be no criminal act unless accompanied by a co-existing criminal intent. If there is no act done within this state with criminal intent, the state has no power to punish; for no crime has been committed within its jurisdiction. This has been very well illustrated in a case in *Plowden* (*p.* 261) where a question arose concerning a forfeiture, where a man became *felo de se*. There, as in other homicides, the offense consists in an injury followed by death within a year and a day; and if the lanquishing in murder can be regarded as a series of

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criminal acts of the slayer, the same reason would hold good in self-murder, and repentance would remove the criminal intent necessary to characterize those acts. But BROWN J. supposes the case of a man who "voluntarily gives himself a mortal wound, and afterwards he repents and is reconciled to holy church;" and says, for all that the King shall have forfeiture of his goods. A man may beyond doubt be held criminally responsible for the consequences of his acts, if those acts are themselves criminal; but they must be reached through the acts. It is the act that breaks the peace, that sets an evil example, and that causes all the mischief. And it would be introducing a principle which has no sanction in the common law, and for which I have been able to see no reason, son, to hold that a man may be punished for results, where he can not be punished for his acts which caused them.

I have intimated that the place of prosecution prescribed by the statute of Edward, was not in affirmance of the common law; and that the place of death did not, at common law, draw after it the previous assault, so as to bring it constructively within the same jurisdiction. As the whole reasoning of my brethren seems to me to rest upon this assumption, I propose to refer to various authorities to determine it.

In the first place, this statute asserts upon its face, that it was doubtful whether, if a blow were given in one county and death followed in another, any indictment lay. The langauge is, "in such case it hath not been found, by the laws or customs of this realm, that any such indictment thereof can be taken in either of the said two counties:"— 1 *East P. C.* 361. If it would previously have been good in either, we have seen that it was in the county of the act, and not of the death. It is also to be remarked that the statute refers to cases where everything occurred within the jurisdiction of England; and nothing

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therefore was usurped in fixing any venue whatever. And the language used, that the indictment shall be "*as good as if the stroke or poisoning had been committed and done in the same county where the party shall die, or where such indictment shall be so found,*" indicates plainly that the stroke was not a subordinate consideration. Where a person died on land from a wound received, at sea, it was not triable by the common law courts of ordinary jurisdiction, although the stroke was within the realm;—1 *East P. C.* 365,—because it was not given in the body of a county. Here again we have an example that the place of death did not govern. And a stroke on land followed by death at sea did not give jurisdiction to the admiralty: 1 *Hale P. C.* 426; *Constable's Case*, 2 *Co. R.* 93*a*. But there are less uncertain authorities than these.

By the common law, all persons present at the commission of a crime, aiding and abetting, are principals. It is laid down by *East*, that where the stroke and death are laid on different days, the abetment should be laid to the stroke, and not to the death:—1 *East P. C.* 351; 2 *Hawk. P. C. c.* 23, § 89. And see also *Viner's Abr.* "*Murder, W.*" In *Rex v. Hargrave*, 5 *C. & P.* 170, it was expressly decided, in a case tried in 1831, where the stroke was given in one county and the death occurred in another, that the *felony* was in the first county. The indictment stated that J. C. assaulted the deceased at, &c., in the county of Middlesex, &c., of which he languished and died in Kent; and then proceeded as follows: "And the said James Hargrave, together with, &c., were *then and there* present aiding, abetting, &c., the said James Cox *in the commission of the said felony.*" It was objected for the prisoner that the indictment was bad, as it did not, with certainty, charge the prisoner with the commission of the offense in any particular place; for the word *there* referred to the two parishes. But Patterson J., said "the giving of the blows which caused the death consti-

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tutes the felony. The languishing alone, *which is not any part of the offense*, is laid in Kent; the indictment states that the prisoners were then and there present, aiding and abetting in the commission of the said felony; that must, of course, apply to the parish of All-Saints, Poplar, where the blows which constitute the felony were given; and the words *then and there* refer with sufficient certainty to that parish."

The reason given by *East* and *Lord Hale*, why, before the statute of 2 and 3 Ed. 6, *c.* 24, an indictment lay in the county of the stroke, is because "*that alone is the act of the party, and the death is but a consequence*:" — 1 *East P. C.* 361; 1 *Hale P. C.* 426.

In *Cole's Case*, *Plowden*, 401, Cole was indicted for the murder of Elizabeth Pembroke, who was wounded on the 12th day of February, and died on the 18th day of June. Cole pleaded an intermediate pardon of all felonies, misdemeanors and offenses. It was insisted that his act did not become a felony until the death, and therefore was not one of the felonies pardoned. But "the justices agreed that the pardon discharged him, because the wound given by the prisoner was the cause of the felony; the giving of which wound was an offense and misdemeanor against the Queen; and that being pardoned by the act, all the consequences that followed from the said offense are also pardoned thereby."

In *Riley v. The State*, 9 *Humph.* 646, where the question of venue under the constitution was involved, the injury and death being in different places, the court say: "Although at common law it was said the offense was not complete until the death, yet it would be doing violence to language to say that the offense was committed in the county where the death happens, although the stroke was committed in another county."

But perhaps the most reliable rule can be drawn from the decisions relating to forfeitures for felony. It is said

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by Lord *Hale* that "the relation of the forfeiture or escheat of lands for treason or felony, to avoid all mean incumbrances, is to the time of the offense committed:" 1 *Hale P. C.* 360.

In *Dame Hales' case*, *Plowden*, 253, (*Hales v. Petit*) Sir James Hales and his wife being seized jointly of an interest in certain leaseholds, he became *felo de se.* Upon a question made concerning the right in his widow by survivorship, it was adjudged that the forfeiture related back beyond his death, to his act that caused it; and the wife's survivorship was anticipated and cut off. And the case was put of a man giving himself a mortal wound, and living for some time, but not for a year and a day; it being declared that, from the time of the original offense, which was the cause of the death, the forfeiture took effect by relation, and would avoid all his dispositions of property made thereafter. "And also, they agreed, in the argument of this case, that if one gives another a mortal wound, and he dies of this wound, and he that killed him is attainted by verdict, the escheat of his land shall have relation to the time of the wound given." And in *Ventris*, 371, it is said "if one giveth another a mortal wound, and then sells his land, and the person dies, there shall be such relation as to make the land forfeited from the first stroke." See to the same effect *Viner's Abr.* "*Forfeiture, R.;*" 1 *Hale P. C.* 426. As a forfeiture was a distinctive feature of a common law felony, I can not but regard these rules as of much weight in deciding the legal effect of the prisoner's conduct. In cases where both death and the cause of death occur within the jurisdiction, the matter is of comparatively little importance how the criminal liability is apportioned; but when the only act done is done beyond our jurisdiction, and yet we seek to punish it, what was before a speculative question becomes one of capital moment.

That principle of the law of nations which denies to any country the right of punishing offenses committed abroad,

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except by its own subjects, rests upon the ground that it has no right to control abroad, in any way, the conduct of foreigners; who must obey the law of the place where they may happen to be, but are responsible to no other power, unless through their allegiance. We have no legitimate concern with the actions of men in Canada, not breaking our peace, or assailing our sovereignty. It is not pretended by any one that, when Tyler shot Jones, he was at the time, in any sense, offending against the state of Michigan. Had Jones died on the spot, this state could not have interfered with Tyler for it. And so long as Jones remained abroad, Tyler was confessedly no infringer of our laws. Tyler committed no act of violence within our borders. For aught that we know, he may have been occupied in yielding aid instead of injury. What, then, can render him a criminal against this state? When and how did he disturb our peace and good order? Jones was not brought here in the prosecution of any murderous design. So far as Tyler is concerned, he might have been carried to Canada as well. Had Jones lived for a few months, although afterwards dying of his wounds, he might have traversed half the states of the Union, and Tyler could have had no voice in controlling his motions. He might go where murder is punished by death, or he might come here, where it is merely a state prison offense; and yet Tyler would be responsible, if this prosecution can be maintained, to any state or country against which the voluntary choice of Jones might make him a constructive offender. Inasmuch as all present encouraging a prize fight are principal offenders, in case either of the combatants is slain, or subsequently dies of his injuries, and are thus made guilty of murder or manslaughter — (*Rex v. Hargrave*, 5 *C. & P.* 170; *Rex v. Murphy*, 6 *C. & P.* 103), in case either of the persons who have recently edified the English public by such an exhibition should visit this state, and die here, within a year and a day, of injuries there received,

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the whole distinguished company that attended that exhibition would become guilty of manslaughter against the peace and dignity of the state of Michigan. And the resort of invalids to hospitals and watering places, for treatment, may, by the death of any one, subject any absent aggressor to the criminal laws of a state he has never seen, should his occasion call him thither at any subsequent period of his life. This is making the guilt of the offender spring from the acts of others, and not from his own. And it is importing into the criminal law a principle at variance with its whole reason. How can the public be wronged by the peaceable entrance of a sick or wounded man, or by his dwelling or dying here? We have no right to exclude him unless his disease endangers the public health. And if any harm arises from his coming, he, or those who bring him, are the public disturbers, and not those who have somewhere else contributed to cause his infirmity or disease, but who could not prevent him from going where he should see fit to go.

I think the judgment should be reversed, for want of jurisdiction to try such an offense.

Judgment affirmed.

Findley M'Hardy and another v. James S. Wadsworth.

The test of the sufficiency of a notice of defense under the general issue, is that it apprises the plaintiff of the nature of the defense relied upon, so that he may be prepared to meet it, and to avoid surprise on the trial.

In an action on a promissory note made by two defendants notice of defense was interposed, that the note was given for the purchase price of cows sold with warranty by plaintiff to defendants; the damages for a breach of which warranty defendants claimed to recoup from the amount of this note. The proof showed the note to have been given for the consideration stated, but that the sale was made by plaintiff to *one* of the defendants. — *Held*, that the notice was sufficient, under the test given, to warrant the admission of the evidence; especially as plaintiff in his bill of particulars, evidently designed to cover the consideration for the note, had claimed to recover for cows sold by him to the defendants.

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M'HARDY v. WADSWORTH.

Objection to a variance between the evidence and the pleading under which it is offered, must be held to be waived where the evidence is received and submitted to the consideration of the jury without the objection being taken.

In an action on a promissory note, given by two on a contract of purchase by one of the makers only, it is competent to recoup damages growing out of the contract of purchase, to the same extent as if the note had been given by the purchaser alone.

Heard May 2d. Decided June 9th.

Error to Macomb Circuit.

The action was by Wadsworth, on the common counts. The bill of particulars specified certain cows, heifers, horses and goods, sold by him to plaintiffs in error, and also a promissory note given by them to him for three hundred and ninety dollars. The defendants pleaded the general issue, with notice of recoupment, which, together with the evidence given under it, are sufficiently stated in the opinion of Judge Christiancy. The plaintiff proved no cause of action except the note. The court charged the jury that the plaintiff would be entitled to recover the whole amount of the note, unless the jury found from the evidence that the facts were substantially as stated by defendants in their notice; and that to entitle the defendants to the reduction claimed by them, the jury must find from the evidence, that the sale of the cattle for which the note was given, and the contract of warranty with respect thereto, were made with *both* of the defendants. The jury under this charge returned a verdict for plaintiff, for the full amount of the note.

A. B. Maynard, for plaintiffs in error.

R. P. & J. B. Eldredge, and *W. P. Wells*, for defendant in error:

The variance between the contract of warranty proved, and that set up in the notice, is fatal:—1 *Chit. on Pl.* 295, 308; 2 *East*, 2; 12 *East*, 452; 10 *Wend.* 437; 1 *Greenl. Ev.* § 66.

The demand of one defendant, for breach of warranty,

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is not the subject of recoupment in an action upon the joint note of both. The reason of the rule in cases of set off applies to recoupment.

CHRISTIANCY J.:

The notice of special matter of defense in this case was, in substance, that defendants would show on the trial that the note upon which the suit was brought was given for a cow and certain heifers mentioned in the plaintiff's bill of particulars, sold by the plaintiff below to the defendants, with warranty, averring the breach of the warranty, and damages thereby, and notifying the plaintiff that they would set up these damages by way of recoupment or reduction of the plaintiff's claim.

The evidence on the part of the defendants corresponds, in all respects, with their notice, except that it shows the sale and warranty made to one of the defendants only, though the note was given by both for the property sold. It is not necessary to decide whether, if the question had arisen under a declaration or special plea, the allegation would have been sufficient to warrant the evidence, without an amendment. Such are all the cases cited by the defendant in error. This notice is not properly a pleading, nor is it to be tested by the same rules applicable to a plea. No issue of fact or of law can be founded upon it. The only issue in the case is the general issue, and this is all the issue the statute authorizes. The difference between such a notice and a plea of the same matter, was recognized and fully explained by this court in *Rosenbury v. Angell*, 6 *Mich.* 513 *to* 515; and it was there expressly held that the only purpose of the notice is to apprise the plaintiff of the nature of the defense relied upon, so that he might be prepared to meet it, and to avoid surprise on the trial; and this was held to be the sole test of the sufficiency of the notice.

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Tested by this rule, it is doubtless true that the notice of a joint contract with two could not, in all cases, nor probably as a general rule, be held sufficient to warrant evidence of a contract with one alone. But the question is whether, under the peculiar circumstances of this case, the notice did not fairly apprise the plaintiff of the nature of the intended defense, and whether he could have been misled as to the sale intended, or surprised by the evidence introduced. The action was between the original parties to the note; the plaintiff, as payee, must be supposed to know what the note was given for, and the nature of the consideration in fact.—And, though he declared upon the common counts, and attached a copy of the note, he relied at the trial upon the note alone; and to this the defense set up in the notice exclusively applied. Judging from the whole case, as presented on the trial, it cannot be reasonably doubted that the plaintiff's bill of particulars was intended to cover the consideration for which the note was given, and not a separate claim, independant of the note.—This bill of particulars is for cows and heifers "sold by the plaintiff to the defendants." And though the plaintiff relied exclusively upon the note, yet his bill of particulars furnishes strong evidence, if any were needed, that he could not have been misled by a notice which stated the contract of sale between the same parties as stated in his own bill of particulars, to which the notice expressly refers. He could not have doubted that the notice referred to the same sale for which the note was given, and to the warranty on that sale. The notice plainly and expressly refers to the sale which constituted the consideration of the note, and to no other. There is therefore no reasonable ground for supposing the plaintiff could have been misled.

No amendment of the notice was needed to avoid surprise on the trial, and no amendment then made could have had that effect.

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It must be remembered, also, that this notice set up only the defense of recoupment, and this was the only ground on which the notice was required; and so far as this question of recoupment was involved, it is difficult to see any difference in the legal effect of the sale, whether made to one or both the defendants. The sale constituted the only consideration for the note of both the defendants upon which the plaintiff relied.—We shall consider this point more fully under a different head.

But there is still another reason why the notice in this case should have been held sufficient. If defective, the plaintiff was not bound to object to it on that ground; and if he did not, he must be held as having waived the objection. So far as appears from the record, he made no objection, either to its introduction or to its consideration by the jury. The only objection appears in the charge of the court to the jury; and this charge does not appear to have been requested by the plaintiff. Indeed, it would seem from the language of the charge, that it was founded in a great measure, if not entirely, upon the idea that the two defendants could not set up the defense of recoupment, upon a sale made to one only. This point we will now consider.

The note upon which the plaintiff sought to recover was made by the two defendants jointly; and it is insisted that the two defendants were not entitled to recoup the damages arising on the breach of a warranty, on the sale which constituted the consideration of the note, because that sale was made to one of the defendants only.

If recoupment were allowed on the same principle of a set-off merely, this objection would be insurmountable. A set-off is in the nature of a cross action to the full extent: it does not deny the validity of any part of the plaintiff's claim or cause of action, but sets up a separate and independent claim against the plaintiff; and

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the defendant is entitled to judgment upon any surplus of his claims beyond those of the plaintiff.

A defense by way of recoupment denies the validity of the plaintiff's cause of action to so large an amount as he claims. It is not an independent cross claim, like a separate and distinct debt or item of account due from the plaintiff, but is confined to matters arising out of or connected with the contract or transaction which forms the basis of the plaintiff's action. It goes only in abatement or reduction of the plaintiff's claim, and can be used as a substitute for a cross action only to the extent of the plaintiff's demand. No judgment can be obtained by the defendant for any balance in his favor. See *Ward v. Fellers*, 3 *Mich.* 282, where the distinctions between these two classes of defenses are very fully discussed.

It is not denied that the defense, by way of recoupment, would have been available to the defendant who purchased the cattle, if the note had been given by, and the suit brought against, him alone.

Now the only consideration given for the note was received by Findley McHardy. Donald McHardy, though a joint maker in form, would seem to have been, as between himself and the other defendant, but a surety; and it is difficult to discover any good reason why he should not be entitled to any defense, connected with the consideration, which would be available to the real principal in the transaction had he made the note and been sued alone. If the consideration paid to the former enures to bind the latter, can there be any good reason why a want or failure of that consideration should not enure to his benefit? We can discover no more reason why the defense, in the present case, should not enure to the benefit of both defendants, than if it had been a defense by way of payment, want or failure of consideration for the note, or fraud in the sale for which the note was given. It prevents circuity of action,

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and accomplishes full justice to all the parties without the violation of any rule of law.

If, instead of setting this up in defense, a cross action had been brought, such cross action probably could not have been maintained by the two defendants jointly. But we cannot see why this consideration should affect the question when set up in defense only in abatement of the amount of the plaintiff's recovery.

The judgment of the court below must be reversed, and a new trial awarded.

MARTIN CH. J. and MANNING J. concurred.

CAMPBELL J.:

I agree with my brethren that a defense arising out of a failure of consideration of a note signed by a principal and surety, may be set up in an action against the two on the note, as well as if there had been no surety. And I think the doctrine of recoupment, arising directly, as here, out of matters forming the consideration, should be permitted in like manner to apply. And I am also of opinion that it would have been entirely competent for the court below, if satisfied (as it probably would have been in this case) that no injustice would follow, to permit an amendment of the notice so as to conform to the truth.

But I do not think the evidence offered was admissible to go to the jury without an amendment of the notice; neither do I think an amendment can be allowed in this court upon facts aliunde the pleadings and record.

The statute of 1839, p. 225, provided that when the general issue was pleaded, a defendant might "give notice with such plea of any matters which, if pleaded, would be a bar to such action, and may give such matter in evidence on the trial in the same manner as if the same had been pleaded." Our present statute de-

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clares that "To entitle a defendant to avail himself of any matters of defense which, according to the practice as it has heretofore existed, was required to be pleaded specially, or of which a special notice was required to be given under the general issue or other general plea, said defendant *shall annex to his plea of the general issue a notice to the plaintiff, briefly stating the precise nature of such matter of defense.*" — *Comp. L.* § 4178. The only changes are that now the notice must be *annexed* to the plea (which, however, was always or generally done in practice before), whereby the notice now must go on file in the cause; and that the notice need not contain more than a brief statement of the precise nature of the matter of defense, instead of that prolixity which, under some rather technical rulings, had made a notice under the old law practically as long as a plea. But the notice, however brief, must contain a statement of the *precise nature* of the matter of defense. The statute never contemplated that a party could introduce matters which the notice does not state directly or inferentially. The difference between a joint contract and the contract of one individual, is as substantial as between a note of A. and a note of B.

Neither are we at liberty, sitting as an appellate court, to look into facts given in evidence to determine whether the plaintiff was or was not really misled by the notice, if the testimony is variant from it. The statute is clear that the precise nature of the defense must appear in the notice itself. If the matter offered in proof is not a distinct transaction, but is merely a step in a transaction which is pleaded, there is no variance, because the one includes the other. And this was the case in *Rosenbury v. Angell*, where a defendant having given notice of an attachment, my brother *Christiancy* held that proof of the preliminary affidavits, without which an attachment could not legally issue, might be introduced, because the

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notice was sufficient "to apprise the plaintiff, with reasonable certainty," that they would be offered in evidence. I think that case was correctly decided. But had the notice alleged an attachment in favor of two plaintiffs, and proof been offered of a suit by a sole plaintiff—which would make a case parallel to this—I cannot perceive on what principle it would have been admissible, or could have been made so. And I cannot assent to the proposition that the admissibility of evidence under a notice can be tested by anything but the notice.

I think the ruling below was correct on this point, and that the judgment should be affirmed.

Judgment reversed.

John Dillin v. The People.

Where, on a trial for murder, it appeared that the deceased had been absent from the neighborhood of the prisoner some eight or ten months preceding the alleged offense;—*Held* competent for the prosecution to show the state of feeling between the prisoner and the deceased immediately preceding such absence.

Where evidence is ruled out as not proper on cross-examination, the correctness of the ruling will not be inquired into where it appears that the witness is afterwards called by the party offering the evidence, and examined fully on the subject.

Where on a trial for murder, a witness for the prisoner is examined as to the prisoner being present and transacting business at a place near the scene of the alleged murder, and near the time it was claimed to have been committed, it is not improper to permit the prosecution to show, by the cross-examination of the witness, any facts having a tendency to show from which direction the prisoner came to that place; as, that the witness went out and found tracks which, at the time, he believed and stated were the prisoner's, coming towards that place; and the like.

It is competent for a court to admit evidence which will not be relevant unless brought home to the prisoner by further proof. But if such further proof is not given, it is the duty of the court to strike out the evidence so admitted.

The prosecution, on undertaking subsequently to connect the prisoner with it, were permitted to show a corrupt agreement of the father and one of the counsel of the prisoner to keep an important witness away from the trial. No evidence was given bringing this agreement home to the prisoner. The court charged the jury that they were at liberty to take into consideration and determine, from all the evidence, whether the inducements held out to the witness to

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keep away, were by the authorized agents of the prisoner. — *Held* erroneous, and that the court should have instructed the jury to discard entirely the evidence of this agreement.

Where evidence was given by the prosecution which indicated strong mental agitation and excitement on the part of the prisoner, with an attempt to conceal it, immediately after the time when (as the evidence tended to show) the murder was committed, it was *held*, that the prisoner was entitled to prove the conversation had by him at the time, as bearing upon the question of his mental agitation and excitement, and tending to disprove the excitement or to show its nature and extent.

Heard April 28th. Decided June 9th.

Error to Barry Circuit.

The plaintiff in error was charged with the murder of Jane Harding, on the thirty-first day of May, 1858. On the trial, at an adjourned term of said court, in November, 1858, James Ransom, a witness for the prosecution, testified that the deceased was the wife of Abram L. Harding, and formerly lived in Maple Grove, in Barry county. She removed from Maple Grove in September, 1857, to Napoleon, in Jackson county. Before this removal, and some time in August, 1857, her house was burned up. She came back to the house of witness in Maple Grove, May 15th, 1858, and stayed there until May 31st. Witness saw her on the morning of the 31st, alone, on foot, going east past his house. She said she was going to the post office, and over into the east settlement to Mr. Anderson's. Witness next saw her dead in the woods on the 16th of June following. From May 31st to June 16th search was made for her, and she was found on the day last named, about twenty-four rods west of a north and south road running through Maple Grove, dead, and partially buried with rotten wood, leaves and barks. Dillin had lived at Maple Grove on a forty acre lot adjoining a half acre occupied by the deceased in 1857. He had wheat on this forty acres in 1857.

The prosecution was then permitted to prove by this witness, under objection for want of relevancy, that this wheat was put up in stacks, and was burned up on the 12th of August, 1857; that the house of the deceased

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was burned the same day, and that he saw them both burning at the same time.

The witness further testified that difficulties arose between the deceased and the prisoner about the burning of the house and wheat stacks, and that the prisoner and five others were complained of by the deceased for burning her house, and an examination had before a magistrate on the complaint, on which the deceased was examined as a witness.

The prosecution afterwards called George W. Hutchinson, who having given important evidence, and having also testified that he was a witness on the examination of the prisoner for the murder, before a magistrate, and was recognized to appear as a witness on this trial, was asked the following question: "Since that time has any effort been made to have you leave and not appear in this cause as a witness?" To which question the prisoner's counsel objected that it was inadmissible to prove efforts to induce the witness to leave, made by any person except the prisoner, or some one authorized by him for that purpose. The prosecution replied that they expected to trace it to the prisoner. The objection was then overruled by the court, and the witness answered; "I dont know how to answer that. I can go on and tell the whole story." The prosecution then asked the following question: "State whether you had any conversation with Mr. Brackett, one of the counsel for the prisoner in this case, about going away and not appearing as a witness on this trial." To which the prisoner's counsel objected, but the prosecution stating that they expected evidence would be elicited to satisfy the jury of the prisoner's connection with it, the objection was overruled, and the witness testified as follows:

"I had conversation with Mr. Brackett about my not appearing as a witness. It was at Belleview, in September last. I told Mr. Brackett that if I had money I

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would go away. Mr. Brackett said he guessed the money could be got. Mr. Peter Dillin, the father of the prisoner, was present, and Brackett proposed to Mr. Dillin that I wanted to borrow some money. After a while Mr. Brackett told me that I could get the money of Henry Hickok. I saw Mr. Hickok, and he proposed to give me $15, and a pair of boots, if I would go to Kansas and look up a man for him. I told him I would go for $20. The contract was finally made in writing. The agreement to be put in writing was, that if I staid away until the first of April next, then I was to pay nothing; but if I came back before the trial, then I was to pay back, with ten per cent. interest. Mr. Brackett drew the contract. The whole thing was well understood between me and Brackett. After the first talk with Brackett about going away, I saw Peter Dillin at Mr. Brackett's office. Brackett had told me my bail would not be liable. I went to Brackett's office to get the money to go away with. Brackett had sent word to Peter Dillin to be present. He was present. Peter Dillin had before said he would try to raise the money; that it was hard work for him to raise money to get the witnesses for the defense. Hickok gave me the money the next day. The money was paid in Brackett's office, and Brackett was present." The witness further testified that he left and went to Marshall the next day, and from there to Detroit, and did not return at the next regular term of the court in October. He afterwards wrote to the sheriff to come after him, and was brought back.

The prosecution then called Polly Carpenter, who testified that on May 31st, 1858, the prisoner came to the house of her husband on said north and south road in Maple Grove, and about forty rods north of the house of Aaron Brooks, and left about eleven o'clock in the forenoon. On cross examination she stated that he was there about an hour. When he had been in there a spell, he asked for a book.

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The prisoner's counsel then asked the witness the following questions: What did he do while in the house? What did he talk about? Did he tell you where he came from? Did he tell you where he was going? While at your house did he inquire for any one? All of which questions were objected to as inadmissible on cross examination, and the objection sustained. But the witness was afterwards called for the defense, and was allowed to testify, and did testify, as to what the prisoner talked about on this occasion, and was allowed to testify fully as to what he said about Mrs. Harding.

Asa E. Lapham, was also called for the prosecution, and testified that on May 31st, 1858, at some time between twelve and one o'clock, witness was at the post office on said north and south road, kept by Hyde. While there, and about 15 minutes after his arrival, the prisoner came into the office, and staid some ten or fifteen minutes. When he came in, he appeared warm. Witness noticed perspiration on his forehead. He leaned back in his chair, and then leaned forward several times. "There was something in his appearance that I can not describe. There was a kind of excitability about his manner that I can not describe. He seemed to have the appearance of being excited, and at the same time trying to conceal it."

On his cross examination the witness testified that the prisoner made an errand at the office. The prisoner's counsel then inquired what the errand was? To which question the prosecution objected, and the court sustained the objection.

The witness further testified that the prisoner bought some letter stamps while there, and had conversation with Hyde, Carpenter and the witness, but the witness was not permitted by the court to state what the conversation was.

Carpenter was then called as a witness for the prisoner, and testified to being at the post office at the time spoken of by Lapham, and to the prisoner having made

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a contract there. The prisoner's counsel enquired of the witness what the contract was? The prosecution objected to the question, and the court sustained the objection. The prisoner's counsel also asked the witness what the prisoner talked about there?—which question was also objected to by the prosecution, and the objection sustained.

Carpenter further stated on his examination in chief, that Lapham was with him at the post office. He noticed that the prisoner was sweaty when he came in. Did not notice anything else. Did not notice his clothes. On his cross examination, he said he did not know which way the prisoner came from, and did not go out with Lapham to see. The following questions were then put to the witness by the prosecution, under the prisoner's objection that they were not proper on cross examination, and the following answers had.

Question. Did you see by the prisoner's tracks which way he came? *Answer.* I can't say that they were his tracks. *Question.* Did you not say to Mr. Lapham on that day, while looking at those tracks, "these are John's tracks?" *Answer.* I don't know as I did. *Question.* Did you not then and there tell Mr. Lapham that you thought they were John Dillin's tracks? *Answer.* I think I did. *Question.* Did you think so? *Answer.* I did. *Question.* Did you see John Dillin before that day? *Answer.* I saw a man that I supposed to be him, going north of the school house,—no body with him. I don't know the exact time. The person I saw was some 30 or 40 rods off. I was chopping some 10 or 15 rods south of the Spencer school house,—by the side of the north and south road.

The testimony being closed, the counsel for the people, in summing up to the jury, commented on the testimony of Hutchinson, relating to the attempt testified by him to have been made by Brackett, Peter Dillin, and Hickok, to hire and induce him, the witness, to go away and not appear as a witness in this cause on behalf of the People;

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claiming and arguing that the same should be received by the jury as tending to establish the guilt of the prisoner.

The counsel for the prisoner requested the court to instruct the jury that they should utterly discard the entire evidence given by Hutchinson in regard to the effort of Brackett, Hickok and others, to induce him to leave and not attend court as a witness in this case. Which instruction the court declined to give, but on the contrary told the jury that they were at liberty to take it into consideration, and determine from all the evidence whether the inducements held out to the witness to leave were by the authorized agents of the prisoner. To this charge, and to the refusal to charge as requested, the counsel for the prisoner excepted.

S. W. Fowler, and *C. I. Walker*, for plaintiff in error:

The evidence with respect to the wheat, house, &c., was inadmissible. It could not be admitted to prove the prisoner guilty of another and distinct offense: — 5 *Mich.* 320,—and it falls far short of admissible testimony to prove a state of malicious feeling towards the deceased, or a motive for the crime.

Mrs. Carpenter's testimony as to what the prisoner said at her house, should have been admitted. It was clearly proper to show what he said, in connection with his coming and going, as proved on the part of the people, as a part of the *res gestæ*, showing his business, his proposed destination, &c.

So what the prisoner said, as well as what he did, at the post office, was admissible, not only as a part of the *res gestæ*, but as showing the condition of his mind; whether he acted and conversed naturally or otherwise: *Rosc. Cr. Ev.* 87, 88; 1 *Phil. Ev.* 23; 1 *Greenl. Ev.* 108, 111; 2 *Har. & McH.* 120; 4 *Wash.* 729; 14 *S. & R.* 275; 2 *Hill*, 257; 10 *Cush.* 253.

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Hutchinson's testimony, unconnected with any proof having a legal tendency to prove the authority of the prisoner to make the arrangement sworn to, was clearly improper, and it was the duty of the court to charge the jury that it was not to be considered by them:—19 *Wend.* 202; 11 *S. & R.* 134; 31 *Pa. St.* 193. As it was, the charge really left it to the jury to find him guilty, from the conduct of an unprincipled attorney and a weak and frightened father, proved by a corrupt witness, but in no way brought home, by evidence, to the prisoner. This was error:—1 *Dutch.* 656.

J. M. Howard, Attorney General, and *H. D. Terry*, for the People:

The instruction asked to the jury, to discard the evidence of Hutchinson, *assumed* that there was no evidence whatever before the jury, tending to show a privity on the part of the prisoner in the attempt to keep Hutchinson away from the trial; and the court was, in effect, called upon to tell the jury so. This was to demand of the judge to pass upon that important question of fact; a fact which is no where conceded in the bill of exceptions. For aught that appears, there may have been abundant evidence showing his connection with the scheme. The bill should show that there was no evidence conducing to prove it; but it being silent on the subject, this court will not presume the court below committed an error. A bill of exceptions does not draw the whole matter into examination, but only the points to which it is taken; and the party must be able to lay his finger on the points which arise, either in the admission or rejection of evidence, or in a matter of law arising from a fact not denied, and in which he is overruled by the court:—8 *Johns.* 495; 2 *Pet.* 1. When the bill does not purport to contain all the evidence, it will be presumed that the evidence, if set forth, would sustain the charge:—29 *Ala.* 322; 4 *Ind.* 266.

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The rejection of the question put to Mrs. Carpenter, on her cross examination, was correct.

The only object of the prosecution in producing evidence of this interview, was to show the prisoner to have been in the neighborhood. They had not asked the witness what the prisoner did or said while at that place. What he did or said could have had no tendency to disprove the fact of his presence. The prosecution had not proved that he there made any preparations or threats to commit violence upon the deceased; and, therefore, the evidence sought to be drawn out on cross-examination, was not a part of the *res gestæ*. It was in fact, an attempt to cross-examine on subjects not at all embraced in the direct examination, and therefore objectionable as coming within the rule laid down in *Horton's case*, 4 *Mich. Rep.* 80, &c.

To make such declarations and acts admissible as *res gestæ*, it must appear that they were concomitant with the principal act, and so connected with it as to be regarded as the mere result and consequence of co-existing motives, in order to form a proper criterion for directing the judgment which is to be formed upon the whole conduct; (1 *Greenl. Ev.* § 110), and much must in such cases necessarily be left to the sound discretion of the Judge, it being impossible to adopt any definite rule applicable to all cases. (*Ibid.* § 108).

What Dillin said about *other* matters could, of course, afford no inference in his favor touching the homicide, and was foreign to the subject. The declaration and the act must be *connected* in point of time, in order to make the former admissible: — 4 *Pick.* 378; 11 *Pick*, 378, 308.

The court did not err in excluding evidence of what was said and done by the prisoner at the post office.

The bill of exceptions does not disclose whether this visit to the post office was before or after the homicide. If before, then what the prisoner said would seem to be immaterial, as being no part of the *res gestæ;* or, if it had

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any bearing, it must have been against the prisoner, and so he has nothing to complain of. If after, his declarations were inadmissible in his own favor. But it being uncertain from the bill of exceptions whether it was before or after, this court, presuming neither way, will not hold that the court erred in excluding them.

MARTIN CH. J.:

The testimony of Ransom respecting the wheat, was competent. The object of the prosecution evidently was, to show the existence of ill will upon the part of the prisoner towards the deceased; and the whole testimony of this witness, so far as set out in the bill of exceptions, tends to show, and was evidently produced for the purpose of showing, that such ill will and malice existed. It is objected that the occurrence was too long prior to, and remote from, that of the homicide; but this can hardly be contended when we bear in mind that Mrs. Harding left the neighborhood of the prisoner, and removed into another county, immediately after the event to which the witness testifies, and did not return until a few days before the murder. The state of feeling existing between the accused and the victim, at and about the time of the alleged crime, is always a subject of legitimate inquiry; and so are facts and circumstances which tend to show the relations they hold towards each other; and where an interval of time, as in the present case, elapses, within which they are separated, the relations when last residing in each others' neighborhood may be shown. The inquiry is pertinent; the only question being as to the value of the testimony, and the weight to be given to it. Thus, if A and B entertain the most hostile feelings towards each other, amounting to deadly hostility, to-day, and A removes from the vicinity of B, remains absent for six months, and then returns, and is found shortly after, murdered, and if circumstances point to B as the murderer, the relations when

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last together may be shown, and will have more or less weight with a jury in determining the question of guilt or innocence, according to the other facts and circumstances shown in the case. There was no error, therefore, in admitting this testimony.

Nor was there error in rejecting the testimony of Mrs. Carpenter, as to what the prisoner said at her house on the morning of the alleged murder, and immediately before it, as to where he came from, and where he was going, and whether he inquired for any one. This was sought to be obtained on the cross-examination of the witness; and whether properly rejected or not upon the ground that it was not the proper subject of cross-examination, ample opportunity was given, when the defense had the case, for inquiry respecting these subjects, and the inquiry was pursued then so far as pertinent; or, if not, it was the fault of the prisoner.

There was no error in excluding the testimony of what the prisoner said at the post office; what errand he made there, and what he conversed about. It was not a part of the *res gestæ*, and is conceded to be only admissible as such, or for the purpose of showing the prisoner's state of mind. I am aware of only one class of declarations of a prisoner (and those he can not give in evidence in his own favor unless the subject is first introduced by the prosecution) which do not come within the rule that declarations and acts of the prisoner, to be admissible, must either precede or accompany the act for the commission of which he stands charged; and those are flight, or declarations made when arrested or accused; and these are received as in the nature of confessions or admissions. The state of mind which the law regards and inquires after, in admitting this testimony, is that existing prior to and at the time of the commission of the alleged offense, and not that which is subsequently manifested, unless in immediate connection with the occurrence; and

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in the latter case, only for the purpose of determining the character of the act. Whether Dillin, at the post office, was calm or excited, was a question of demeanor, and not of mental condition; and could be determined by the general inquiries allowed to be put to the witnesses who saw him there, and did business with him; and to allow him, under pretence of showing his state of mind at that time, to introduce evidence of what he said, would introduce a rule which, in many instances, and especially in cases of cool and deliberate crime, would enable the perpetrator to manufacture a complete defense; especially in those cases in which direct evidence was wanting, and circumstantial evidence relied upon. The true rule is, that all acts and facts upon which any reasonable presumption of the truth or falsity of the issue can be founded, may be given in evidence; but such acts or facts must precede or be part of the *res gestæ*, and unless as confessions, or given for the purpose of explanation or qualification, the subsequent acts and statements of the party are never admissible. The acts and declarations of the prisoner given in evidence in his favor, ought to be connected, both in point of subject matter and of time, with the acts or declarations proved against him:— *Rosc. Cr. Ev.* 88. And the fact that he appeared warm and excited when he arrived at the post office, will not justify evidence on his part of what he said there, and which he may have made haste to say for the purpose of diverting suspicion or manufacturing a defense.

We discover no error in the ruling of the court in admitting the testimony of Carpenter. The objection appears to have arisen from a misapprehension of the rule laid down in *The People v. Horton*, 4 *Mich.* 67, which was substantially to the effect that a defendant can not, upon cross-examination, inquire respecting matters of defense not fairly connected with the matters testified to on the direct examination, although known to the witness

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under examination; both because it tends to promote confusion, and because the course would give undue advantage to a defendant, by allowing him to prove his case, or some portion of it, through answers to leading questions; which would violate a cardinal rule of evidence. But the evidence of Carpenter, thus produced, was relevant, and the pertinent subject of cross-examination, as following up the inquiry whether he knew which way the prisoner came from when he reached the post office. His presence there was the subject of investigation; and nothing relating to his coming and presence are within the rule of that case.

The only remaining allegations of error upon which the prisoner relies, are the admission of the testimony of Hutchinson, and the refusal of the court to exclude it from the consideration of the jury. He had been a witness for the People on the preliminary examination before the committing magistrate, and was offered to prove that attempts had been made by the prisoner's counsel and friends to induce him to absent himself from the trial. The objection to his testimony was met by the undertaking, on the part of the prosecution, to connect the prisoner with it; and upon such undertaking it was admitted. There was no error in admitting it under such circumstances; but it was the duty of the court, had such undertaking not been made, or had it failed, to exclude the testimony from the consideration of the jury, when the cause was given to them. Now, it is true that the burden of showing error lies upon the plaintiff in error; and therefore there must be enough upon the face of the record to show error affirmatively; and that when the bill does not purport to contain all the evidence, it will ordinarily be presumed that if set forth it would sustain the ruling and charge of the court; and it seems to be thought that no error is affirmatively shown in this bill, in the ruling and charge of the court in denying the mo-

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tion of the prisoner to strike out such testimony, after the evidence was closed. A careful consideration of the bill of exceptions will show that no attempt was made by the prosecution to redeem the pledge given to connect the prisoner with the transaction. The language of the bill is, that the counsel for the People commented upon Hutchinson's testimony, claiming and insisting that it should be received by the jury as tending to establish the prisoner's guilt. Now if the prisoner were shown to have had cognizance of the attempt to get Hutchinson out of the way, it would and ought to have a very powerful influence upon determining the question of his guilt. Understanding the bill of exceptions to set out substantially that the counsel for the People claimed that this unsupported testimony of Hutchinson should go to the jury, and that the court so ruled, there was error in the ruling denying the motion. Such testimony should only be allowed to go to a jury when some evidence accompanies it, upon which the jury may inquire as to the prisoner's knowledge of and complicity in it; and they should be carefully instructed, even under such evidence, to exclude the testimony from consideration unless the prisoner is found to have been so connected. It is impossible to tell how far this testimony turned the scale against the prisoner. That it must have had some weight, can not be doubted. For this error the judgment must be reversed, and a new trial ordered.

CHRISTIANCY J.:

I agree in the opinion of the Chief Justice, except so far as it relates to the exclusion of what Dillin said at the post office.

The prosecution had proved by Lapham that, on the same day and immediately after (the evidence tended to show) the murder had been committed, he saw the prisoner at the post office, where he, the prisoner, stayed some

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ten or fifteen minutes; that "when he came in, he appeared warm. I discovered," he says, "perspiration on his forehead. He leaned back in his chair, and then leaned forward, several times. There was something in his appearance that I can not describe. He held his head in an erect position. There was a kind of excitability about his manner that I can not describe. He seemed to have the appearance of being excited, and at the same time trying to conceal it."

Now this evidence tended to show strong mental agitation and excitement, with an attempt to conceal it; and hence had a strong bearing upon the question of his guilt. The question whether such mental agitation and excitement existed, and the nature and extent of it, became very material and pertinent to the issue; and every thing fairly calculated to show the nature and extent of such agitation was admissible. A man's conversation, under such circumstances, is quite as likely to furnish a fair index of his state of mind, as his motions and external appearance. Under strong mental excitement of the kind which the evidence of Lapham tended to show, the conversation is likely to be somewhat incoherent, disjointed, or to show some want of calmness and deliberation. If nothing of this kind appeared in his conversation, and it evinced calmness, deliberation, and a natural consecutive order of ideas, this would have tended strongly to rebut the inference to be drawn from the external indications of excitement already testified to by Lapham. The jury, therefore, were entitled to have this evidence before them, to enable them properly to estimate the value of the evidence touching the external indications of such excitement. It is very true that, if the prosecution had not introduced the evidence tending to show excitement, the conversation of the prisoner on that occasion would not have been admissible in his favor. It is also true that the jury should have been instructed that, in considering the evidence relating to the conversa-

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tions, they were not to consider his statements as evidence of facts stated in his own favor, but that it was only material so far as it bore upon the question of excitement or agitation of mind; unless, indeed, some fact or statement had appeared in the conversation which might bear against the prisoner, as tending to show his guilt, and in such case, that his whole conversation, at the same time and in relation to the same subject, should be considered together.

MANNING and CAMPBELL JJ., concurred with CHRISTIANCY J.

Judgment reversed.

The Township of Marathon v. The Township of Oregon.

Where, after the division of a township, the town boards have met and determined the amount of the township indebtedness to be paid by the new township, such amount is a fixed and liquidated demand against such new township, which it it is the duty of its town board to allow, and to issue an order on the township treasurer therefor.

If such town board refuse to perform this duty, mandamus to compel their action is the proper remedy, and not an action against the township to recover the amount of the demand.

Heard May 29th. Decided June 9th.

Error to Lapeer Circuit.

The township of Oregon, by act of the Legislature of 1846, was organized from territory constituting a part of the township of Marathon. In March, 1856, as claimed by the plaintiff, a joint meeting of the township boards of the two towns was had, for the purpose of apportioning the debts of the township of Marathon, at the time of the formation of Oregon therefrom; which meeting found due from the latter township to the former, as its proportion of such indebtedness, $1,483, to recover which this action was brought. Judgment having been rendered for the defendant in the court below, the plaintiff brought error.

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MARATHON v. OREGON.

The case having been once argued in this court on the merits, a re-argument was ordered by the court on the question, whether the plaintiff had any remedy, except by mandamus, to enforce payment of the amount of the indebtedness of the old town apportioned as due upon the division?

G. V. N. Lothrop, *N. B. Eldredge*, and *M. E. Crofoot*, for plaintiff in error:

1. Mandamus lies generally to compel the performance, by public officers or inferior tribunals, of *ministerial* duties; or of *public duties* plainly enjoined, and the exercise of which are *not discretionary*:—3 *Mich.* 428; 18 *Pick.* 446; 1 *O. S. R.* 149; 11 *How.* 289; 12 *Pet.* 524; 10 *Pet.* 497; 17 *How.* 230; *Ibid.* 304. And perhaps to correct manifest abuses of discretionary power:—3 *B. & Ad.* 704; 7 *B. & C.* 692; 3 *Mich.* 475. But the duty must be a clear, legal, and imperative duty:—3 *Ad. & E.* 425; 25 *Barb.* 73; 1 *Doug. Mich.* 320; 1 *Kern.* 574; 12 *Pet.* 525; 11 *How.* 289; 1 *O. S. R.* 77; 2 *Chand. Wis.* 247. And it will not be granted where there is any other adequate remedy, by action at law:—2 *Burr.* 1045; 1 *T. R.* 404; 2 *Doug.* 526; 1 *Doug. Mich.* 320; 10 *Johns.* 484; 2 *Cow.* 444; 1 *Wend.* 319; 10 *Wend.* 363; 25 *Wend.* 685; 2 *Hill*, 45; 6 *Hill*, 243; 23 *Vt.* 478. Though it seems it may be allowed as a concurrent remedy where ministerial officers and corporations may be liable to an action on the case for neglect of duty:—23 *Wend.* 461; 1 *Kern.* 573. But never to enforce mere private rights, or to collect a debt as such, though it may be employed to enforce a ministerial act to aid in the course of such collection, where the law directs a specific mode of collection:—25 *Barb.* 73; 3 *R. I.* 22.

2. It may safely be assumed that the writ in this case must be asked, either, 1st. Against the town; or, 2d. Against the town board; or, 3d. Against the supervisor.

Mandamus will not lie against the town. For to do so

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would be to apply the process to the collection of a debt. The town is the debtor, and it might as well be resorted to to compel debtors in all cases to pay their debts. The debt in this case stands against the township, like any common debt. No mode for the collection thereof is provided: — *Comp. Laws*, § 604. The right is to be enforced by common law remedies.

Nor will it lie against the town board. The town board is not a legal tribunal to which claims *must* be presented for adjudication. Their action is not necessary to, or binding on, creditors. The board only represents the town in the *amicable* settlement of business. Their action or non action is therefore no part of a suitor's remedy. But the claim has already been settled by the proper board — the joint board raised for the special purpose. It was thus fully and finally made a town charge. It is not within the jurisdiction of the town board, who can neither make it a town charge nor reject it: — *Comp. Laws*, § 604; *Ibid.* § 564. Nor can the town board raise the money to pay this debt. When the town neglects or refuses "to vote such sum or sums as may be necessary to defray the *ordinary township expenses*," then the board may raise the requisite amount: — *Comp. Laws*, § 597. This is all they can do; and they will not be commanded to do more: — 15 *Barb.* 607.

Nor will it lie against the supervisor. For there is no law which makes it his plain official duty to include this claim in his tax assessment. Nay, there is no law which empowers him to do it. Should he assume to do so, his act would be illegal.

The supervisor must have direct warrant, either in some statute or in the certificate of the action of some competent body, before he has jurisdiction to assess any tax whatever: — 5 *Mich.* 182.

Township indebtedness may be collected in two ways: *First.* By *voluntary* payment, which may be either by the town board within the limits of their authority, or by vote

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of the town at a lawful meeting:—*Comp. Laws*, §§ 495, 564. *Second.* By action at law, or other proper proceeding in the legal tribunals.

After recovery of judgment, the statute expressly restrains the farther prosecution of common law remedies; it withholds execution, and directs that the amount "shall be *levied* and *collected* as other "township charges:—*Comp. Laws*, § 4917. Here, for the first time, is created a plain official duty to levy a tax for a township debt. On the production of a certified copy of a judgment, to the supervisor, he would be required to *levy* it as a part of his assessment. Then, and not till then, is it a tax required by law. And at this stage a mandamus would lie to enforce the performance of this duty.

We have not overlooked a common class of cases found in our own reports and elsewhere, where *mandamus* has been held the appropriate remedy against town and county officers. Cases for the collection of damages awarded in laying out highways, &c., are of this class. In these cases it will be found that the statute expressly directs a mode for the payment of the award. An official or a ministerial duty is created, and it is this duty that the writ is employed to enforce. Such are, with many others, the cases in 2 *Mich.* 187; 5 *Mich.* 223; 5 *Cow.* 292; 10 *Wend.* 363; 16 *Wend.* 520; 4 *Barb.* 64; 20 *Barb.* 295; 4 *Zab.* 54; 22 *Pick.* 264; 3 *Wis.* 333.

3. Even if mandamus might be a lawful remedy, it is not an exclusive one. For, though it is true that where a statute creates a new right and gives a new remedy, this remedy is exclusive; yet when the statute merely creates the right, and is silent as to remedies, all the common law remedies are open:—1 *Chit. Pl.* 112. Here the statute makes the claim in question a debt, and declares that the new town shall *pay* it, and there leaves it. In such case an action at law may be maintained:—1 *Wend.* 54; *Ibid.* 319; 25 *Wend.* 680; 2 *Hill*, 45.

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M. Wisner, and *A. B. Maynard*, for defendant:

The statute providing for the division of a township, prescribes the rule for the apportionment of its debts. It creates the liability on the part of the new township, and the amount of such liability is fixed and determined by the apportionment made by the township boards in the manner provided by the statute. No suit could be maintained by the township so divided for any share of its indebtedness until the apportionment had been made. The township board of the new township might be compelled by mandamus to meet for the purpose of making the apportionment: — 2 *Cow.* 485.

The statute provides that no execution shall be issued on a judgment against a township, but that the same shall be collected like other town charges: — *Comp. L. p.* 1309. A judgment, therefore, would be no more effective *as a remedy*, than the judgment of the township boards. Their action is judicial and conclusive. It is not open to review directly, or collaterally by suit. The defendant could as effectually resist a mandamus to compel the payment of a judgment of a court, as one to enforce the payment of the sum apportioned by the township board: — 13 *Pet.* 498; 5 *Rawle*, 18; 19 *Wend.* 56.

If, then, the judgment or decision of the township boards is binding upon the townships, must not the plaintiff seek payment of such judgment in the manner pointed out by the statute, by presenting the same to the township board of the defendant, and demanding their order on the treasurer of the town? The statute provides how the charges against a township shall be allowed and paid, and to hold that the payment of this or any other claim against a township, especially where the amount is settled and adjusted, could be enforced by action, would be to treat the statute as a nullity: — 2 *Sandf.* 460.

A remedy that would exclude mandamus, must be legal and competent to afford relief to the applicant upon the

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very subject matter of his application: — 1 *Barb.* 34; 1 *Doug. Mich.* 319; 3 *Mich.* 427; 4 *Mich.* 188. Had the plaintiff applied to this court to enforce the payment of the sum apportioned by the township boards, would the application have been refused on the ground of there being an adequate and effectual remedy, by action, upon the subject matter of his application?

The following cases fully establish that mandamus is the appropriate and only remedy in cases of this character: 2 *Mich.* 189; 15 *Barb.* 529; 20 *Barb.* 294; 2 *Binn.* 275.

CAMPBELL J.:

This suit is brought to recover an ascertained sum found by the united action of the township boards to be due from Oregon to Marathon, upon a division of the latter township, whereby the former was set apart and became liable for its share of the debts to be thus determined: — *Comp. L.* 247-8.

Putting aside, for the present, all questions concerning the regularity or sufficiency of the proceedings of the local authorities, the important consideration is suggested, whether an action will lie for the sum ascertained. Townships may be sued in some cases, and judgments obtained against them; but it is claimed by the defendant that actions will not lie in cases like the present.

By examining the statute which fixes the liability upon judgments, we find that when a judgment is obtained against a township "no execution shall be awarded or issued upon such judgment, but the same, unless reversed, shall be levied and collected as other township charges," &c.— *Comp. L. p.* 1309, § 4917. A judgment which can only be enforced in this way, amounts practically to nothing more than a fixed and unchangeable ascertainment or assessment of indebtedness, whereby an open claim becomes liquidated. It is placed on the foot-

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ing of a definitely ascertained township charge. The only way to enforce it, if resisted, is by mandamus.

The action in this case is brought, not upon an open and disputed account, but upon a liquidated claim, determined by a statutory board or tribunal. Although the statute declares the basis of contribution, upon the division of a township, to be the assessment roll previous to the division, yet it is not pretended that any claim for contribution could be enforced until the two township boards convened together and determined the amount to be contributed by each. If the action lies, it lies upon the amount so ascertained and apportioned, and not upon an open account. Whether any revisory power exists in any court to review the proceedings of the town boards, has not been argued. If such power exists anywhere, it can only be under *certiorari*, which has not been taken, and which could not now be had, because of the lapse of time. This award or determination is absolute, unless set aside,—if indeed there is anywhere power to set it aside.

Being ascertained by the tribunal referred to, it becomes, under the statute, a charge upon the township.—And being such a charge, it is the duty of the town officers to see that it is paid. And if they fail to perform this duty, requiring the claimant to obtain judgment upon it cannot serve either to liquidate it any more perfectly, or to make it any more definitely a township charge. Nor would any action of the town authorities, or of the township itself avail, to destroy the validity of the finding.

Where a duty exists in a township to pay a specific and ascertained charge, it would be unjust to both parties, debtor and creditor, to permit or require a suit at law, when the judgment cannot be collected by execution. The township ought not to be put to useless expense by the fault of its officers, and the creditor ought not to be put to delay, or a double pursuit.

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It has been held in a great many cases, that *mandamus* was the proper remedy to compel satisfaction, by a municipal body of this kind, of a liquidated demand. Such has been the course in regard to the damages ascertained by appraisers upon opening highways:—*Harrington v. County Commissioners of Berkshire*, 22 *Pick.* 263; *People v. Township Board of La Grange*, 2 *Mich.* 187; *People v. Supervisors of St. Lawrence*, 5 *Cow.* 292; *People v. Supervisors of Kings County*, 16 *Wend.* 520; *Treat v. Middletown*, 8 *Conn.* 243; *People v. Superisors of Westchester*, 4 *Barb.* 64; *Miller v. Bridgewater*, 4 *Zab.* 54.

In this state a *mandamus* has been issued to compel a board of supervisors to allow the amount of a claim which was adjusted by proper officers under the law:—*People v. Supervisors of Macomb*, 3 *Mich.* 475. And we have had occasion to compel the granting of a warrant upon an adjusted claim, in the case of *People v. Auditors of Wayne County*, 5 *Mich.* 223. The case of the *Commissioners of Highways of Niles v. Martin*, 4 *Mich.* 557, contains some remarks upon the impropriety of subjecting towns to actions for the faults of their officers.

In New York the following cases have also a bearing upon the general question of the propriety of a mandamus, instead of an action:—*People v. Edmunds*, 15 *Barb.* 529; *Same v. Same*, 19 *Barb.* 468; *People v. Supervisors of Columbia*, 10 *Wend.* 363; *Bryce v. Supervisors of Cayuga County*, 20 *Barb.* 294. And in Wisconsin the case of *School District No.* 2 *v. School District No.* 1, 3 *Wis.* 333, which was a case of a division of a school district, decided that an action would not lie for the sum awarded. It is true the law required it to be levied as if voted. But we do not think the duty there any more positive than here.

A distinction is asserted between liquidated demands of this kind, and judgments, because the statute is express that on these no execution shall be awarded, "but the same

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shall be levied and collected as other township charges."— If this ascertained balance is a township charge, then the statute in express terms makes the rule of levying and collecting it the rule of levying and collecting a judgment. The statute is express that the township shall be charged with it, and shall pay it. The township board are authorized to audit and allow claims against the town, and the amounts allowed by them are required to be paid by the Treasurer on their order. There are also claims for damages on the opening of highways. When settled by the commissioners and owner, as they might be when the provisions of the statutes now under consideration were passed, the law declared "such person shall be entitled to an order from the township board, upon the treasurer of the township, for the amount of damages specified in such agreement:" — *R. S.* 1846 *p.* 134. "If appraised, they shall be levied and collected in the township within which such highway is situated, and shall be paid by the township treasurer upon the order of the township board, as other township charges:"—*p.* 135. The language in regard to judgments against counties is the same as against towns. What then are township charges? We have seen how they are paid, which is by an order from the township board upon the treasurer; and by the law prescribing his general duties, he is required to pay over and account for moneys in his hands "according to the order of such township, or the officers thereof duly authorized in that behalf." *Comp. L.* § 568. It is fair to assume that any amount which is a fixed liability of the township, and entitled to be paid, is a township charge. And certainly, a claim which is to be levied and collected *like* other township charges, is not to be preferred above other township charges among which it is classed, or enforced differently. The very object of such a statute seems to be to prevent a judgment creditor of a township from obtaining a preference. And there is no reason in the world why one ascertained creditor of a township should not stand on an equality with all others.

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We have no statute now which defines a township charge at all; but the Statutes of 1838 did so, and recognized claims allowed by the board as such: and they were included in the taxes to be raised, in addition to the sums voted by the township meeting: — *R. S. of* 1838 *p.* 64.— No vote beyond their mere allowance was required by law, to include them within the tax levy; but the clerk certified to the commissioners such amounts as were "*to be raised*," not such amounts as the township or board *had voted*: *R. S.* 1838, *p.* 82. The present law requires the clerk to certify in the same manner to the supervisor the amount *to be raised* for township purposes.

The statutes relative to the voting of money authorize the township meeting to vote such sums as they may deem necessary for defraying *all proper charges and expenses arising in the township.* The board, upon the neglect or refusal of such meeting to vote "*such sums as may be necessary to defray the ordinary township expenses*," may vote such sums themselves. If the term "*charges*" means what we have referred to as "*township charges*," and does not come within the term "*ordinary expenses*," then, if after allowance by the board, or when put in judgment, they require any further action, we should have the strange result of a board authorized to repair the neglect of the township for ordinary expenses, yet not authorized to provide for acknowledged and liquidated debts. This would enable the township to repudiate. But although the use of the term "*charges*" in two different senses is awkward, yet fortunately we have the means of tracing it out in its origin. The Revised Statutes of 1838, p. 57, authorized the township meeting to "vote such sums of money as they shall judge necessary for the purpose of supporting and maintaining the poor, and *for all other necesary and proper charges arising in the township.*" And yet the meeting had no power whatever to vote a dollar to pay allowed and li-

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quidated claims; and the term "*charges*" thus used, means any matters which were supposed likely to require expenditures in amounts either definite or indefinite. But in declaring the effect of the allowed claims, the law requires them to be raised in addition to the amount voted by the town meeting, and puts each claim allowed by the board on the same footing with the aggregate voted sum laid in one general amount by the meeting on the township, declaring the sums thus ascertained by either body "*township charges.*" A "*township charge,*" then, is fixed in amount. But the charges to be provided for by township vote, are not necessarily liabilities existing, and are merely estimated sources of expenditure, which may or may not include fixed debts. There are some matters, at least, which are, under no view, *ordinary township expenses*; such as those sums which the Board of Supervisors may authorize to be raised by the township for special purposes, as mentioned in § 345 of the Compiled Laws; and probably many others; and such matters could not be wisely trusted to the discretion of the board. But there would be no very good reason for leaving liquidated claims to the sole discretion of the township. And if left to them at all, it would be exceedingly difficult to reach such a body by coercive measures. It is certainly no violation of terms to class the payment of debts ascertained among ordinary expenses.

We think cases like this call for a similar action to that had in the case of *The People v. The Supervisors of Macomb County.* There the supervisors were compelled to allow the claim as a ministerial act, because it had already been legally adjusted by an authorized board. Should the township board of Oregon refuse to allow this claim and give an order on the treasurer for the amount, we think a mandamus is the proper remedy. And a refusal by any other township officer to do any act which the law requires — which, however is not

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to be anticipated in any case — would subject him in like manner to a similar mandate.

The court below committed no error in holding that the plaintiff's action would not lie. The judgment must be affirmed with costs.

MARTIN CH. J. and MANNING J. concurred.

CHRISTIANCY J.

I am unable to concur in the opinion of my brethren in this case. I admit the correctness of all the decisions which they have cited, but I do not think them applicable to the present case.

In all the cases cited, nothing remained to be done but the performance of a clear ministerial duty, imposed by law upon the officer or board to whom the mandamus was directed. The county, township or school district represented by such officers or board, was not in default; but the neglect or refusal of such board or officers, was the only obstacle of which the relator could complain.

If such be the fact in the case before us — if the township of Oregon has performed all its duties, in reference to the claim of the township of Marathon, and nothing remains to be done but the performance of a clear ministerial duty of the township board, township clerk, or supervisor of Oregon, in voting, certifying or assessing the tax, then the remedy of the relator is by mandamus, to compel the board, the clerk or supervisor, to perform that ministerial duty.

But so far from being the duty of these officers, there is, I think, no power in any or all of them combined, to raise the tax for the payment of this claim, until either the inhabitants have voted to raise it, or until, as a substitute for this vote, a judgment has been obtained against the township.

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That the action of the township boards of the respective townships, in making the apportionment, if legally performed, has made this a fixed and definite township charge, I fully admit. If such action has not been legal, then certainly no duty is imposed upon any officers to raise the tax, and no mandamus should issue to compel it. In discussing the form of remedy, however, the legality of the action of the board must be assumed.

But the mere fact that this claim has become a fixed and definite township charge, does not authorize the supervisor to assess a tax for its payment, nor the clerk to certify it to him for assessment.

Ordinary township expenses, when audited and allowed by the board, and especially when orders have been issued for them upon the treasurer, are quite as clearly fixed and definite township charges: — *Comp. L.* § 564. But the supervisor cannot, even in such cases, assess the tax for the payment of such charges, nor could the clerk certify the amount to him for assessment, until either the inhabitants, at a legal meeting, have voted to raise the amount (*R. S. Ch.* 16 § 3; *Comp. L.* §495) or, in default of such vote by the inhabitants, the township board have voted to raise it, pursuant to the act of March. 31, 1849 (*Comp. L.* § 597).

But the claim in question in this case, does not, I think, come within the designation of ordinary township expenses; and therefore cannot be voted by the township board.— From the adoption of the Revised Statutes of 1846 until the passage of this act of 1849, there was, I think, no power in any or all the township officers to raise or assess a tax, even for ordinary township expenses, until the inhabitants at a legal meeting had voted to raise the sum. In connection with this act of 1849, see *R. S. Ch.* 16, §§ 72 *to* 75; *Comp. L.* §§ 564 *to* 567. In this respect the Revision of 1838 (p. 64 § 40) differed materially from that of 1846 on the same subject: — (*Comp. L.* § 564.) The former, after providing for the auditing and allowance of claims, &c.,

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by the township board, and that the sums so allowed, "as well as any sum directed by a vote of the township to be raised for township purposes, shall be considered proper township charges," added the words: "*and shall be raised on the taxable property of the township in the manner provided by law.*" This latter provision was left out of the Revision of 1846. And the following additional provisions in the latter Revision, not found in the Revision of 1838, show, I think, very clearly, that the provision just quoted was purposely omitted in the Revision of 1846; and that by the latter Revision the Legislature plainly indicate the intent to withhold from the township board the right they had formerly possessed of raising taxes, for claims audited and allowed by them, without a vote of the inhabitants.— These additional provisions are, 1st: That the township board is required to meet annually on the Tuesday *next preceding* the *annual township* meeting, for the purpose of auditing and settling all claims against the township:— (*Comp. L.* § 564): and 2d: That "all accounts audited by such board shall be filed, and presented by such clerk for the inspection of any of the inhabitants of the township, and shall be produced at the *next annual township meeting, and there read by him*, if the same shall be required by the meeting." This was doubtless required to enable the meeting to vote the sums necessary for their payment under section three of the same chapter (*Comp. L.* § 495).

Thus stood the law till the act of 1849 (*Comp. L.* § 597), which provides that "whenever the qualified electors of any township, at the annual township meeting, *shall neglect or refuse to vote such sum or sums* of money as may be necessary to defray *the ordinary township expenses*, the township board of any such township is hereby authorized, at any regular meeting, to vote *such sum or sums* as may be necessary for that purpose, not exceeding such amounts as are or may be limited by law." This act, by a necessary implication, prohibits the board from "voting"

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any sum for any purpose other than "*ordinary township expenses.*" And unless the claim before us is one for ordinary township expenses, it can only be raised by a vote of the inhabitants. This my brethren admit, and they therefore hold it to be an ordinary township expense.— But to reach this conclusion a criterion is adopted for distinguishing ordinary from extraordinary expenses, which, it seems to me, does violence both to the language and the spirit of the statute. The distinction is made to depend solely upon the question whether it is liquidated and has been allowed by the board, or is unliquidated and has not been allowed. If such was the meaning of the Legislature, they were exceedingly unfortunate in their mode of expressing it. To get any such idea from the language, requires divination rather than interpretation. The distinction intended by the statute depends, I think, entirely upon the nature or character of the "expense," — whether such expense was of the kind *usually*, ordinarily, incurred in the transaction of the common township business, or such as could only be likely to happen on extraordinary occasions or unusual exigencies. Whatever difficulty there might be in any case, in determining whether a claim fell under the one or the other, there can be none in the case before us. This is a claim which springs from facts existing before the township; the claim came into existence with the township, and as a consequence of its creation. It can never occur again. It is much larger in amount than the probable ordinary expenses of an entire year, or perhaps several years.

Claims for extraordinary expenses may be audited and allowed, as well as others, and there may be unliquidated and unaudited claims for ordinary expenses; though probably no tax could be assessed by the board for the latter before allowance.

The conclusion at which my brethren have arrived necessarily assumes, that the power of the board to vote the tax is coextensive with their power to audit and allow

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claims. I do not think such a conclusion warranted by the statute. The board are expressly authorized to audit and settle "*all claims against the township*": — *Comp. L.* § 564. Their power to vote a tax is, by words equally express, confined to *ordinary township expenses*: — *Comp. L.* § 597. Why is the latter limited and the former unlimited?

The township clerk has no authority to *determine* the amount to be raised by tax; nor can he certify any sum to the supervisor for that purpose simply because it has been audited and allowed as a township charge; much less is he *required* to do so: if such were his duty, the provision authorizing the township board to vote it, when for ordinary expenses, would be utterly useless and nonsesical, not to say repugnant; for as clerk of the board he is bound to file and present all the accounts and claims which have been audited and allowed. The recognition or allowance of a claim, as a township charge, is one thing; the determination to raise the amount by a tax, is another and different thing, and one over which the clerk has no power, except to certify the fact, when it has been determined by the inhabitants or the board.

It must be borne in mind that this claim was adjusted by the township boards in 1856, under substantially the present law: and the question whether a mandamus will lie, must depend upon the law which was then in force, or the present law. It cannot be helped by the statute of 1838 long before repealed. My brethren seem to me to take it for granted that, because a mandamus would have lain under the statute of 1838, it may also be supported under the statutes, now in force, which are essentially different. I cannot see how the conclusion follows from the premises.

Without a vote of the inhabitants, then, the township clerk could, I think, have no power to certify this claim to the supervisor under *Comp. L.* § 807, or *Laws*

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of 1858, *p.* 181; nor the supervisor to assess it under *Comp. L.* § 815, or *Laws of* 1858, *p.* 182. Though the statute makes it a township charge, there is nothing in the language conferring the power, or imposing the duty, upon any officer or board, to vote or assess a tax for its payment, more than for other township charges not covered by the act of 1849. It does not allude to the subject of levying or collecting the sum by tax. The language of the statute is, "and each township shall thereafter be charged with and pay its share of the debts, according to such apportionment." We must therefore look to some other provision for the power and the duty to impose the tax.

It is only necessary here to say, that if, after the apportionment, each or either of these townships should vote to raise the amount apportioned to it, and any township officer of either should refuse to perform any ministerial duty required of him for imposing the tax, a mandamus might be issued at the instance of a creditor whose claim was against the original township before the division, to compel such defaulting officer of either township to perform his duty. And the township to which the sum was due would be entitled to the like remedy.

But if a mandamus is to issue to compel the assessment of this tax, to whom shall it issue, and what officer or board is to be compelled to raise the tax? It must issue, if at all, to some board or officer having a power, under some statute, to impose the tax had no mandamus been issued: for no township board or officer has any common law power to levy this or any other tax; nor can the mandate of the writ give the power, or impose the duty. It can simply enforce the execution of a power and the performance of a duty already existing.

As no power in the township is competent to vote or order this tax but the inhabitants at a legal meeting—

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they having neglected to vote it, the default is with them, not with their officers. Shall the writ issue to the inhabitants to compel them to vote the raising of the tax? This will not be claimed, as it might exceed the power of the court to compel obedience to the writ.

The case of *School District No.* 2 *v. School District No.* 1, 3 *Wis.* 333, cited by my brother Campbell as deciding the question before us, somewhat resembles the present case in some of its circumstances; but the statute of that state providing for the division of school districts is essentially different from ours for the division of townships; and it is precisely upon this difference that the decision of the court in that case rests. The Wisconsin statute required the district board of the district retaining the school-house, to raise the amount "in the same manner *as if the same had been authorized by a vote of their district for building a school-house*;" that is, by a tax which the board had the power, in such case, to assess. If our statute authorized the supervisor to assess the necessary tax in the present case, in the same manner as if authorized by a vote of the inhabitants, the cases would be parallel, and no one would doubt the remedy by mandamus. Such is the provision of our own statutes in reference to the division of school districts. *Comp. L.* § 2320.

Is there, then, no mode provided to compel the raising of this tax without a vote of the inhabitants? I answer; the statute has provided a remedy, plain, simple and adequate; and that remedy is by obtaining a judgment against the township. The judgment of a court of competent jurisdiction against the township, dispenses with a vote of the inhabitants, furnishes an equivalent safeguard against dishonesty and abuse, and imposes upon the supervisor the same duties in regard to the levying of the tax as would be imposed by a vote of the inhabitants. And upon producing to the supervisor a certified copy of the judgment, and requesting him to levy the amount, he would, I think,

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be bound to assess it without a certificate from the township clerk. If not, the clerk upon receiving the like copy of the judgment, and the request, would be bound to certify the amount to the supervisor. Such, I think, is the effect of section 7, chapter 148 (§ 4917) of Compiled Laws, which is in the following words: "When a judgment shall be recovered against any township, or against any township officers, in an action prosecuted by or against them in their name of office, no execution shall be awarded or issued upon such judgment, but the same, unless reversed, shall be levied and collected as other township charges; and when so collected, shall be paid by the township treasurer to the person to whom the same shall have been adjudged, upon the delivery of a proper voucher therefor."

This is the only provision which in any manner alludes to or requires the levying of a tax where it has not been voted by the inhabitants, or which imposes any duty upon any officer to levy or collect. It is to be "levied and collected as other township charges." Other township charges are levied by the supervisor, and collected by the treasurer. After such judgment duly brought to the notice of the supervisor, and a request to levy the tax, his duty to assess it would be clear and plain; and if he refuse, he may be compelled by mandamus.

But my brethren hold, that the section to which I allude gives no more authority to assess than existed without it. This, I think, is an error. There is not a word to be found in the provision making the present claim a township charge, nor in any provision in reference to the township board, or any township officer, indicating, in the remotest degree, how the amount is to be collected, nor referring at all to the subject of its collection, until we reach this provision for the collection of a judgment.—Hence the common law remedy by suit is necessarily implied:—1 *Chit. Pl.* 112; *Stafford v. Mayor*, 6 *Johns.* 1; *Hawkins v. Trustees*, 1 *Wend.* 58; *People v. Brook-*

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lyn, 1 *Wend.* 318; *People v. Mayor*, 25 *Wend.* 680; *Ex parte Lynch*, 2 *Hill*, 45. And the language of this section is, I think, quite as clear an authority for the supervisor to assess a tax, as the provision of the law of 1838 (*p.* 64 § 40) was for the township board to order it. Neither imposes the duty expressly upon any particular officer or board — both, however, are equally clear by reference. But if this provision (§ 4917) only authorizes the board to order the tax, it is still the first and only provision in our present statute by which they have any such authority; and this is after judgment.

My brethren profess to see in this provision but one object — that of preventing a judgment creditor from obtaining a preference. This is to suppose the Legislature were providing a remedy against a township as an insolvent debtor — are idea which I cannot think ever occurred to the Legislature. I think this provision, taken in connection with the other provisions cited, indicates an intention to recognize the common law right of bringing suit against a township, not only for torts (when they may be liable) but on all claims disputed by the township and not allowed by the board, as well as those which they have the right to allow, but for which they can not vote, and the inhabitants refuse to vote, a tax; that an execution was denied, and a tax substituted, because townships generally have no property which could be taken on execution, without great detriment to the public interest; and, however collected, the amount must ultimately be raised by tax.

Whether the Legislature have adopted the best possible mode for accomplishing the objects they had in view, by these several provisions, I have not undertaken to inquire; because I have not felt at liberty to disregard the provisions they have seen fit to enact, and to substitute others which I might think they should have enac-

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ed. I will, however, say that I do not think the operation of these statutes will be improved by the construction which my brethren have felt it their duty to adopt.

Judgment affirmed.

The People on Relation of the Board of Education of Detroit v. The Treasurer of Wayne County.

On the hearing of an application for a mandamus, the party showing cause is entitled to open and close the argument.

Under the present Constitution and statutes, all moneys which are paid into the office of the county treasurer, on account of fines, penalties, forfeitures and recognizances, are to be credited to the Library Fund, and apportioned and paid over by the treasurer to the proper local officers, without any deduction for expenses, either attending the collection of the particular sums paid in, or embracing the general criminal expenses of the county. The taxable costs in proceedings to collect, should be kept separate, and do not belong to this fund.

Heard June 6th. Decided June 9th.

Motion for a mandamus. The relators had applied by petition, and an order had been made that the respondent show cause this day.

H. D. Terry, for the respondent, now showing cause, claimed the right to open the argument, and the COURT held that to be the correct practice.

E. Hall and *S. T. Douglass*, for the relators.

CAMPBELL J.:

A *mandamus* is applied for, to compel the respondent to pay over to the Board of Education their share of moneys in his hands received from fines and recognizances. The question submitted is, whether the amounts paid in to him from those sources are liable to any deductions for expenses, either attending the collection of the particular sums paid in, or embracing the general criminal expenses of the county.

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The present Constitution, *Art.* 13, § 12, declares that "The Legislature shall also provide for the establishment of at least one library in each township; and all fines assessed and collected in the several counties and townships, for any breach of the penal laws, *shall be exclusively applied to the support of such libraries.*"

So far as fines are concerned, this language is too plain to be open to construction. No deduction for expenses or otherwise can lawfully be made from such fines. The whole amount collected belongs to the library fund, and no portion can be applied elsewhere.

The other moneys appropriated for that purpose are so given, not by virtue of any constitutional provision, but under a statute, which reads as follows: "The clear proceeds of all fines for any breach of the penal laws of this state, and for penalties, or upon any recognizances in criminal proceedings, and all equivalents for exemption from military duty, when collected in any county," &c., shall be apportioned among the several townships by the county treasurer. This apportionment is required to be made between the first and tenth days of April, according to the number of children within the school ages, as appearing by the statements on file in his office: — *Comp. L. p.* 752.

Except as to fines, which are now regulated by the Constitution which was adopted subsequently to this act, the disposition of these funds is under the control of the Legislature; and it must depend entirely upon their action whether all or only a portion of these moneys shall be given for the town libraries. We must therefore look at the whole legislation upon the subject to ascertain the design of the act in question.

Chapter 155 of the Compiled Laws provides for the collection of penalties and forfeitures, and requires "all sums of money collected on account of any penalty or forfeiture" to be paid over to the county Treasurer:—*Comp.*

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L. §§ 5126, 5127, 5134, 5135, 5143, 5150. **The costs and fees are allowable as in civil cases upon the proceedings** to collect, and are separate from the penalty: — §§ 5136, 5140. On indictments the costs are expressly given to the use, not of libraries, but of the county: — § 5688. The whole amount collected upon the penalty itself is plainly required to be paid over to the county treasurer by these sections. The taxable costs can not be deducted from the amount forfeited, but should be kept separate; and, if paid into the library fund by mistake may be corrected.

By § 5151, it is declared that "every county treasurer shall keep an accurate account of all moneys paid to him on account of fines, penalties, forfeitures and recognizances, separate and distinct from all other accounts, and shall credit the same to the Library Fund," &c. And, by §5152, it is directed that "all the moneys belonging to such Library Fund shall be apportioned by the treasurer at the times, &c., and shall be paid over, &c., according to such apportionment."

The moneys belonging to this fund must necessarily include all that has been legally paid into it, subject to such deductions, after it has been paid in, as the laws authorize or require. Without questioning the right of the Legislature to make such deductions as they deem expedient, except from fines, it is very clear that until they see fit to make such deductions, — inasmuch as no money can be drawn from the treasury without some legal authority — the fund must remain inviolate. No provision of law has yet been enacted allowing or requiring any money to be deducted from this fund. The criminal expenses are not a charge upon it. The clear proceeds, therefore, as the laws now stand, include all sums paid into the treasury from the sources mentioned.

It is unnecessary to consider the collateral questions argued. We are of opinion that the treasurer is bound to

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include in his apportionment, and to pay over to the several local officers, all moneys which are paid into his office on account of fines, penalties, forfeitures, and recognizances. A *mandamus* should therefore issue as prayed. We do not, however, regard this as a proper case for costs.

The other Justices concurred.

Bennett B. Bloomer v. Henry M. Henderson and others.

Where a bill was filed to set aside a mortgage as fraudulent, and neither the mortgage, the bill nor the answer, contained any reference to a promissory note accompanying the mortgage; *Held*, that the existence of such a note was not involved in the issue, and evidence with respect to it, which was objected to when taken, must be disregarded at the hearing.

The assignee of a chose in action takes it subject to all equities existing between the parties to the instrument, but not to any latent equities which some third person may have against the debtor or party bound by the instrument. The assignee of a mortgage, therefore, who has purchased the same in good faith, does not take it subject to any equities between the mortgagor and his grantor, growing out of the fraud of the mortgagor in procuring the title to the land.

One who has given a mortgage to be sold for a fraudulent purpose, cannot set up the fraud as a defense to the mortgage in the hands of a *bona fide* purchaser.

Possession of land by a grantor is no notice of any rights or equities in him, to one who acquires an interest in the land on the faith of his recorded conveyance.

Heard May 12th. Decided June 9th.

Appeal by defendant Henderson from Genesee Circuit in Chancery.

The bill was filed against David S. Jones, Edwin L. Hoisington, and Henry M. Henderson, and avers that the complainant, on the 8th of May, 1858, was the owner in fee and was in the quiet possession of certain premises: that on that day he negociated with defendants Jones and Hoisington for the sale of these premises, which resulted in an agreement on the part of complainant to sell them to Jones for $950; $350 of which was to be paid by a deed from Jones to complainant of a forty acre lot in

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Venice, Shiawassee county: that the remainder of said purchase money ($600) was to be secured to complainant by mortgage on the land sold, payable December 1st, 1858: that it was made a part of said sale that Jones and Hoisington should buy of one Sawtell another forty acre lot in Venice, and secure Sawtell for $400, the purchase money, by a mortgage on the land in Clayton bought of complainant; in which event, complainant was to take said last mentioned 40 acres, subject to an encumbrance, as a payment of $400, and receive a mortgage on the land sold by him in Clayton for $200 only, payable December 1st, 1858, with interest: that complainant accordingly, on the 13th of May, 1858, executed his deed to Jones, acknowledged it on the 15th, and on the same day took it to Jones: that at his house he met Yerkes, Sawtell's agent, who said Sawtell's deed had not come from Oakland county, where he lived; whereupon, it was agreed that complainant's deed should be delivered to Jones, and Jones should deed to complainant the land which was to be taken at $350, and give to complainant his mortgage for $200 due in December, on the land in Clayton, and that Jones should give his mortgage for $400 to Sawtell, as soon as the deed to complainant arrived of the other 40 acres in Venice, with the understanding that the arrangement should not be binding unless the same was all carried out in good faith: that the deeds were exchanged, and the mortgage for $200 given accordingly: that another day was appointed for a meeting, but Sawtell's agent did not come — but Jones said he would carry out the arrangement when the deed should come: that still another meeting was appointed for May 26th, at the house of Jones, where Yerkes, Sawtell's agent, was present with the deed from Sawtell: that Yerkes, on learning that Jones had put the complainant's deed on record, refused to deliver Sawtell's deed and take back the $400 mortgage on the Clayton land, till he had ascertained that Jones had not in the

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meantime encumbered it with anything else than the $200 mortgage to complainant: and that Jones declared he had not encumbered said Clayton property.

It appeared, however, on examination, that on the 15th day of May, Jones and wife had executed a mortgage to defendant Hoisington, on the land deeded by complainant, for $493, payable in six months with ten per cent. interest, which mortgage was recorded on the 17th of May. Thereupon Sawtell refused to deliver his deed, and Jones did not and could not fulfil his contract with complainant. The bill alleged that Hoisington was interested in the transaction with Jones, and aware of all the details and particulars thereof, and in the taking of said mortgage conspired with Jones to defraud complainant: that on the 22d of May, 1858, in order to consummate the fraud, Jones and Hoisington went to Flint to sell said mortgage of $493, and did sell the same to defendant Henderson for a horse worth $100, and $175 in money, and Hoisington assigned the same to Henderson: that at the time of said assignment, complainant was in the open and notorious possession of said premises mortgaged, and had been for five years, which fact complainant believes was known to Henderson: that said mortgage was given by Jones to Hoisington, without consideration; that Henderson paid an inadequate consideration therefor, and had reason to believe that the same was fraudulent and invalid when he took the same: that Henderson has the mortgage, and Hoisington has the horse and money, and complainant fears they will dispose of the same: that complainant demanded of Jones to be placed back in his former position, but in vain; and he claims that Hoisington should return the horse and money to Henderson, and Henderson should cancel his mortgage, and Jones should reconvey the title.

To this bill the defendants Jones and Hoisington did not answer, and an order was entered taking the same as confessed against them.

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Henderson answered that he never knew or heard of the complainant till he was shown, on or about the 17th of May, 1858, an abstract of the land in Clayton described in the bill, from which abstract it appeared that complainant once owned said land, and conveyed the same to Jones: but he does not know whether at that time, or before, or since, said complainant had *possession* of said land: that said land was not worth $950, and was not worth more than $500: that he knows nothing whatever of any of the arrangements and negotiations set forth in said bill between complainant and the other defendants, or between them and Sawtell, but admits the execution and delivery of the deed from complainant to defendant Jones, as set forth in the bill, and the mortgage from Jones to Hoisington. He denies fully that he knew of Hoisington's connection with, or knowledge in regard to, the bargain between the other parties to this suit and Sawtell; or that he knew of the alleged conspiracy to cheat and defraud complainant, or had any intimation of any of the allegations in said bill connected with the sale of said land to Jones.

He further avers that, on the 17th of May, 1858, Hoisington, then an entire stranger, came to defendant at Flint, and showed him the mortgage of Jones, and asked defendant to purchase it, stating that the land described in it was unencumbered except by a prior mortgage of $200 to one Perkins: that he refused to purchase the mortgage till Hoisington would bring him an abstract from the registry of deeds, which he procured, and from which his statements appeared to be true: that defendant then went himself to the register's office, and was told by the register that the abstract was full and complete: that he then inquired about the value of the land, and was satisfied that it was worth about $500: he then purchased the mortgage of Hoisington, and took from him an assignment dated May 17th, 1858, which was recorded on the same day: he paid to Hoising-

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ton a horse worth $150, and $175 in cash, which he believes was the full value of the mortgage, subject to the prior mortgage: that when he bought said mortgage he had no knowledge, information or belief, that complainant was in possession of the premises: that he knew nothing of the consideration of the mortgage between Jones and Hoisington, except that he was told by the latter that the mortgage was given for a valuable consideration, and he had no reason to suppose the same to be fraudulent, and had no cause of suspicion then or now, except from the allegations in the bill; and that he bought the mortgage in perfect good faith, and for an adequate consideration.

Replication to this answer was filed, and considerable evidence taken. Among other evidence, defendant Henderson offered a note, purporting to have been given by Jones to Hoisington, of the same date and for the same amount as the mortgage, with a recital therein that it was given "as collateral security of a mortgage bearing even date herewith, executed upon" the premises described in the mortgage. This evidence was taken subject to complainant's objection for irrelevancy.

A. & E. Gould, for complainant:

Henderson took the mortgage subject to all the equities of the original debtor at the time of the assignment: — 2 *Johns.* 441, 479; 2 *Wash.* 255; *Wal. Ch.* 31; 6 *Mich.* 134. The possession of complainant was notice of equities: --19 *Ga.* 335; 15 *Ill.* 540; 10 *Barb.* 354; 10 *How.* 348; 4 *Rich.* 105; 14 *Pa. St.* 112; 8 *Blackf.* 471.

The mortgage was fraudulent and void in the hands of Hoisington, and void also in the hands of the assignee, though he pay value for it without notice of the fraud: —11 *Paige*, 467; 2 *Johns. Ch.* 35; 4 *Wash.* 585; 4 *Hill*, 193; 9 *Cow.* 409; 3 *Cow.* 353; 18 *Johns.* 493; 20 *Johns.* 144.

Walker & Russell, for defendant Henderson:

The delivery of the deed by complainant to Jones, was

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complete and binding:—2 *Mich.* 390; 23 *Wend.* 43; 3 *Sand. Ch.* 136.

The fraud for which deeds are set aside, as null, is some fraud in the *execution or delivery of the instrument*, as by a misreading or substitution of one instrument for another. A misstatement as to the *consideration*, much less a failure to pay the consideration, is no ground for setting aside a conveyance:—8 *Cow.* 290, 293; 3 *Hill*, 513; 2 *Greenl. Cruise, p.* 498.

But the rule that the assignee of a chose in action takes it subject to all existing equities, is confined to the equities between *mortgagee and mortgagor*, and does not relate to equities existing between some third person and the assignor: 2 *Johns. Ch.* 441; 3 *Barr*, 399; 2 *Cow.* 297. A mortgagee's assignee stands precisely in the situation of the purchaser of the fee, and Henderson will be protected under the facts just the same as if he had bought the title of Jones in fee:—1 *Smith Lead. Cas.* 43; *Coup.* 279. A bona fide purchaser of a title fraudulently obtained, will be protected:—2 *Lead. Cas. in Eq. p.* 98.

Whatever may be the rule as to constructive notice from possession, in this case there is a final and conclusive answer to complainant's bill, that when Henderson bought the mortgage he found a deed from the occupant on record, *and in such a case the law presumes, and he was entitled to presume, that Bloomer's possession was consistent with and not adverse to his recorded conveyance:*—14 *S. & R.* 333; 5 *Pick.* 450; 25 *Mo.* 318; 2 *Stock.* 519; 3 *Sandf.* 176; 15 *N. Y.* 354; 22 *Barb.* 338.

It has been held that such a possession, after a conveyance, is not notice of a lien for unpaid purchase money; much less is it notice in a case like this:—7 *Sim.* 401.

CHRISTIANCY J.:

All the substantial allegations of the bill in this case, so far as relate to the contract between complainant and Jones

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and the whole transaction between him and Jones and Hoisington, as well as between the latter two, are substantially and satisfactorily proved; and the facts disclose, beyond all reasonable doubt, a gross fraud perpetrated by Jones and Hoisington upon the complainant.

But it is unnecessary to consider what might be the rights of complainant as to Jones and Hoisington; as they have allowed the bill to be taken as confessed, and have not appealed.

We are only to consider whether the complainant is entitled to the relief he asks, or to any relief, against Henderson, the purchaser of the mortgage fraudulently executed by Jones to Hoisington, and by the latter sold to Henderson.

From Henderson's answer, which is fully supported by the evidence, it appears that he purchased the mortgage in good faith, and without any actual notice or knowledge of the manner in which the deed had been obtained from complainant, or of any want of consideration for the deed, or of any fraud or intended fraud upon the complainant: that Henderson relied for his knowledge of the title and the validity of the mortgage entirely upon the abstract of the title made by the register of deeds, and had no actual notice of complainant's possession. He paid for the mortgage one hundred and seventy-five dollars in cash, and a horse worth one hundred and fifty dollars.

Though the complainant had improvidently delivered his deed to Jones before he had received the consideration agreed upon, and Jones had put the deed upon record, yet he insists, *first*, that the mortgage of Jones to Hoisington, being but a chose in action, Henderson, in the purchase of it, must be considered as having notice of all the equities existing between complainant and Jones, the mortgagor: *Second*, that the mortgage was void in the hands of Hoisington, as against Jones himself; being executed with the design of defrauding complainant, and must therefore be

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void in the hands of the assignee: and *third*, that at all events, as complainant remained in the open and peaceable possession of the premises, that possession was notice to Henderson of his equitable rights in the land.

In answer to the complainant's first proposition, Henderson has undertaken to rely, *first*, upon evidence of a negociable promissory note, claimed (at the hearing) to have been given with and secured by the mortgage, and which was not due at the time of the assignment; and *second*, he insists that if the note be entirely thrown out of the case, and the mortgage be considered purely as a chose in action, still he could only be bound, in purchasing the mortgage, to take notice of any equities existing between Jones, the mortgagor, and Hoisington, the mortgagee; and that as between the latter the mortgage was valid.

As to the first ground taken by the defendant, we think the case is not to be affected, in any respect, by any considerations connected with the promissory note. No note is mentioned or referred to in the mortgage, nor in the assignment. And if the evidence were admissible, we are by no means satisfied from it that any such note was given with the mortgage, or that it had an existence prior to the assignment. But we do not think it proper to discuss this evidence, as all evidence touching the note was objected to, and was clearly inadmissible under the pleadings. The bill is silent on this subject; and the note is not mentioned or relied upon in the answer. It was not involved in the issue. See *Warner v. Whitaker*, 6 *Mich.* 133.

As to the second ground of defense to the complainant's first proposition, we think the assignee of a chose in action takes it subject to all equities existing between the parties to the instrument, but not to any latent equities which some third person may have against the debtor, or party bound by the instrument. In other words, Henderson took this mortgage subject to any equities existing between Jones, the mortgagor, and Hoisington, the mortgagee (unless Jones

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was cognizant of, or assented to the sale): because, as to such equities, the instrument indicated upon its face that Jones was the debtor, and the proper party of whom inquiry was to be made, as to any equities he might have against it. But we do not think he was bound to inquire of the complainant (who was not a party to the instrument) as to any rights or equities he might have against Jones, the mortgagor, or Hoisington the mortgagee; as there was nothing in the nature of the instrument, or upon its face, to indicate the propriety of any inquiry of the complainant. Hence, we think Henderson took the mortgage discharged from any equities of the complainant, unless the possession of complainant is to be considered notice, a point we shall presently discuss. We are here considering the case independent of the question of possession:— See *Murray v. Lylburn*, 2 *Johns. Ch.* 441; *James v. Morey*, 2 *Cow.* 297; *Bank of Niagara v. Rosevelt*, 9 *Cow.* 409. The cases cited by complainant's counsel, when carefully examined, will not be found to conflict with the rule here laid down.

But complainant insists that this mortgage was *void* as between Jones and Hoisington, because executed with the design, on the part of both, to defraud complainant.

Whether Jones would have had the right to set up this defense against the mortgage in the hands of Hoisington, is a question which may be considered as not fully settled by the authorities. For the affirmative, see *Smith v. Hubbs*, 1 *Fairf.* 71; *Norris v. Norris' Admr.* 9 *Dana*, 317; *Nellis v. Clark*, 20 *Wend.* 24; for the negative, *Bessey v. Windham*, 6 *Q. B.* 166; *Findley v. Cooley*, 1 *Blackf.* 262; *Fairbanks v. Blackington*, 9 *Pick.* 93; *Hawes v. Leader*, *Cro. Jac.* 271; *Doe v. Roberts*, 2 *B. & Ald.* 367.*

But it is unnecessary to determine whether Jones could have set up such a defense against Hoisington, as we are all of the opinion that he could have no right to set up *his own fraud* against Henderson, who purchased the mort-

* See *Quirk v. Thomas*, 6 *Mich.* 100, 104, 107, 108.

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gage without notice of the fraud, relying in good faith upon the title as it appeared of record. An assignee of a chose in action can not be bound to inquire of the maker of the instrument whether he had not, in concert with the other party, executed the instrument for the purpose of committing a fraud upon others. He, at least, can not be heard to complain if an assignee has chosen to act upon the presumption that it was executed for an honest purpose, and by an honest man. To hold otherwise, would be to encourage fraud, rather than to suppress it. But there is still another reason why Jones would not be allowed to defend against Henderson, on this ground. It is clear from the evidence that the mortgage was made by him *for the very purpose of sale*, to enable him to reap the advantage of his fraud. He himself attempted to sell it before Hoisington sold it to Henderson. No court could sustain such a defense in his behalf without giving direct aid in the consummation of the fraud.

But the complainant insists that his continuance in the open and peaceable possession of the premises, must be considered constructive notice to Henderson of all his rights and equities in the premises.

We do not think the doctrine of constructive notice from possession can safely be carried to this extent, or applied at all to a case like the present. Where a party enters and holds possession under a contract of purchase, or a deed not recorded, or some other claim of right, and continues to hold open and peaceable possession under such claim, such possession is, I think, very properly held to be notice to the world of the right or claim under which he holds. Possession in such cases raises a reasonable presumption that the party in possession has some right in the premises; and it is but reasonable to require those who undertake to acquire a right or interest in the land from any other person, to take notice of the possession,

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and to inquire of the party in possession as to the nature and extent of his rights. Such, I think, is the spirit of the rule to be deduced from the authorities; and I think it correct in principle; but, as the point is not here involved, my brethren reserve their opinion whether this doctrine should apply as against a party ignorant of the possession.

But the object of the law in holding such possession constructive notice, where it has been so held, is to protect the possessor from the acts of others who do not derive their title from him: not to protect him against *his own acts;* and especially against his own deed. If a party executes and delivers to another a solemn deed of conveyance of the land itself, and suffers that deed to go upon record, he says to all the world, "whatever right I have, or may have claimed to have in this land, I have conveyed to my grantee; and though I am yet in possession, it is for a temporary purpose, without claim of right, and merely as a tenant at sufference to my grantee."

This is the natural inference to be drawn from the recorded deed; and in the minds of all men, would be calculated to dispense with the necessity of further inquiry upon the point. All presumption of right or claim of right is rebutted by his own act and deed. One of the main objects of the registry law would be defeated by any other rule. See *Scott v. Gallagher*, 14 *S. & R.* 333; *Newhall v. Pierce*, 5 *Pick.* 450; *N. Y. Life Ins. Co. v. Cutler*, 3 *Sandf. Ch.* 176; *Lead. Cas. in Eq. Vol.* 2 *pt.* 1, *p.* 118. The cases cited by complainant's counsel may, I think, all be reconciled with this view of the rule.

This rule works no injustice in the present case, but is as just in its application, as it is clear in principle.

A gross fraud was committed by Jones and Hoisington. The loss must fall either upon complainant or Henderson. Upon principles of equity, which of them should bear this loss? If the conduct of each had been equally prudent and unexceptionable, and neither had contributed more than the

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other to put it in the power of the wrong doers to commit the fraud, the equities of both might be equal, and the court might leave the parties where they have placed themselves without aiding either. But if either, by gross carelessness, has put it in the power of the wrong doers to commit a fraud, which must result in a loss to himself or to some innocent third person, he should bear the loss who thus improvidently enabled the wrong doers to commit the fraud.

The complainant, in utter disregard of the dictates of common prudence, delivered his deed to Jones before he had received the consideration, and before the arrangement, upon which it was to be delivered, had been perfected; and with equal improvidence, chose to trust to the verbal assurances of Jones, or Jones and Hoisington, that it should not be binding, or should be given back, if the arrangement should not be carried out. He thus put it in the power of Jones to place the deed on record, and to exhibit himself to the world as the owner of the land, and authorized all persons to deal with him as such. Jones then executes the mortgage to Hoisington, who offers it for sale to Henderson. The latter, like a prudent man, requires an abstract of the title, and, after obtaining it, goes to the register to assure himself of its correctness; and being assured of its correctness, makes the purchase. He is guilty of no negligence; he relies in good faith upon the record. If he was misled, it was by the complainant's own act; and it would violate every principle of justice to allow the complainant to throw the loss, occasioned by his own culpable carelessness, upon Henderson, who had acted with due caution and in good faith.

The decree of the court below, so far as it relates to the defendant Henderson, must be reversed, and the bill, as to him, dismissed.

The other Justices concurred.

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JULY TERM, 1860, AT LANSING.

Vincent Y. Pennoyer v. James I. David and another.

One partner, after the dissolution of the firm, cannot by his admission create a new partnership contract, nor revive a claim against the firm which has been barred by the statute of limitations. But except as to claims so barred by the statute, and others coming within a similar reason, the admission of one partner, made after such dissolution, having reference to previous actual partnership dealings or transactions, stands upon the same ground, and is evidence against the firm in like manner, as if made before the dissolution.

But such admission, made after dissolution, must be confined to cases where there have been *in fact* previous partnership dealings with the plaintiff, or some transaction with the firm out of which a liability to the plaintiff might have originated; and the fact that there have been such dealings or such transaction, must be shown by some general evidence, at least, outside of the admission itself.

Heard April 11th. Decided July 9th.

Questions reserved from Wayne Circuit.

The action was brought against James I. David and James Campbell, as survivors, &c. of Daniel C. Vreeland, who together, during the summer of 1855, constituted a partnership, which was dissolved by the death of Vreeland, in November of that year.

The declaration was upon an account stated, to prove which "plaintiff offered evidence that in December, 1855, after the dissolution of the firm by the death of Vreeland, defendant Campbell accounted with plaintiff, and admitted that there was a final balance of $507 due the plaintiff. Various items entered into this account on both sides, spreading over the time from May to December; some of them, on both sides, being items that accrued after the death of Vreeland. The defendant objected to the evidence," and thereupon the Circuit Judge reserved for the opinion of this court the following questions:

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1st. Can one partner, after the dissolution of the co-partnership, bind his surviving co-partner by his admissions?

2d. Is the admission, by a surviving partner, of a balance in an account, of which some items accrued after the dissolution, evidence of an account stated against a surviving co-partner, who has neither before nor since such settlement authorized or confirmed the same?

J. M. Howard, for plaintiff, cited:

6 *Cow.* 442; 11 *Ves.* 5; 16 *Ves.* 57; *Story Part.* § 328, *and note* 2; 1 *Taunt.* 104; 2 *Bay*, 533; 11 *Wend.* 96, 99; 11 *N. H.* 246; 11 *Pick.* 400, 487; 16 *Pick.* 401, 406; 1 *Gall.* 635; 6 *Greenl.* 41; 7 *Gill*, 85; 2 *Comst.* 525.

Hand & Hall, for defendants, cited:

2 *Mich.* 102; *Coll. Part.* §§ 118, 121, 545; *Story Part.* § 324; 11 *Wend.* 95; 8 *Md.* 399; 1 *Pet.* 367; 3 *Johns.* 537; 15 *Johns.* 401; 2 *Comst.* 523; 2 *Jones*, 185; 1 *A. K. Marsh.* 189; 3 *Munf.* 194; 1 *Nott & McC.* 561; 5 *H. & J.* 60; 2 *Blackf.* 372; 2 *McLean*, 87; 2 *Doug. Mich.* 206; 2 *Greenl. Ev.* §§ 126, *et seq.*; 1 *Johns.* 34; 2 *Ry. & M.* 239.

CHRISTIANCY J.:

In reply to the first question propounded, we think it is well settled, both upon principle and authority, that one partner, after dissolution of the firm, can not, by his admission or contract, create a new partnership liability; nor, for a like reason, can he, by his admission, revive a claim against the firm which has been barred by the statute of limitations, since this is equivalent to a new contract.

On the other hand, with the exception of claims barred by the statute of limitations, and others coming within a similar reason, we think it equally clear in principle, that the admission of one partner, made after such dissolution

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having reference to previous actual partnership dealings or transactions, stands upon the same ground, and is evidence against the firm in like manner, as if made before such dissolution. The dissolution can not destroy the joint liability of the partners, nor alter their relations to third persons in respect to contracts made or transactions which occurred before the dissolution. The dissolution operates upon future, not upon past transactions. As to persons whose claims have been contracted on the credit of the firm, the partnership, for all substantial purposes, continues till such claims have been satisfied. And persons who have had dealings with the firm during its continuance, are, *as to all matters touching such dealings*, entitled to the same benefit from the admissions of a single partner, whether made before or after the dissolution, unless shown to be false or fraudulent in fact: — See *Wood v. Braddick*, 1 *Taunt.* 103; *Lacy v. McNeale*, 4 *D. & R.* 7; *Cady v. Shepherd*, 11 *Pick.* 400; *Vinal v. Burrill*, 16 *Pick.* 401; *Col. on Part.* (*Perkins Ed. of* 1848) § 546 *and cases cited; Story on Part.* § 328: see also *Mann v. Locke*, 11 *N. H.* 246, where the principles upon which such admissions are receivable are very clearly and ably presented.

But it is objected that the power of a single partner, in such case, to make an admission of a previously existing liability, involves the power of creating a new liability where there had been no previous dealings with the firm, and no such prior liability existed in fact. It was doubtless this supposed difficulty which led the courts of New York, and a few others which have followed their authority, to take the broad ground excluding such admissions altogether. But the rule which entirely excludes such admissions, leads to another inconsistency, no less obvious than that which is sought to be avoided by it. Thus, the same courts which deny all power of one partner, after dissolution, to bind his former partners by the admission of a previous liability, yet hold that he may liquidate a

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previous account: — (*McPherson v. Rathbone*, 11 *Wend.* 96, 99), and that "if there be no agreement to the contrary, it may be presumed that each partner still has authority to dispose of the partnership property, to collect, *adjust and pay debts*, and to give proper acquittances:" — (*Per Bronson J. in Van Keuren v. Parmelee*, 2 *Comst.* 525).

Now the power to liquidate a previous account against the firm, to adjust and pay debts, and to give acquittances, would seem necessarily to involve, if not to rest upon, the power to make an admission of the correctness of the account liquidated, and the amount of the debt paid or adjusted. And where (as is generally the case), there are mutual accounts in favor of and against the firm, the power to adjust, and to give a valid acquittance or receipt for the amount found due the firm, necessarily, we think, rests upon the power to state an account, and to admit the claims against the firm. If he has power to state an account, and to agree upon a balance when that balance is in favor of the firm, upon the same principle he must have the like power when the balance happens to be against it. Without the power to admit a previous liability against the firm, we can see no principle on which a receipt or acquittance, in such case, could be admissible evidence against the firm.

But the admission by a single partner, after dissolution, of a pre-existing partnership liability, must be confined to cases where there have been, *in fact*, previous partnership dealings with the plaintiff, or some transaction of the firm out of which a liability to the plaintiff might have originated; and the fact that there have been such dealings, or such transaction, must be shown by some general evidence at least, outside of the admission itself; otherwise the objection that the power to admit a previous liability involves the power to create a new one, would be insurmountable. But if such evidence be given, it lays a proper foundation for the admission, as it brings

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the subject matter within the power of the single partner to make an admission in respect to a liability which may have grown out of such previous dealings or transaction, and the balance that may have resulted therefrom. The admission is thus shown to have reference to transactions which took place during the existence of the firm, and as to which the dissolution could not alter the relations of the parties. We think this very clear in principle, though we have been referred to no authorities, and none have come under our observation, directly in point for a case like the present. See however, for an analogous rule, 3 *Kent Com.* (3*d Ed.*) 50, *and cases there cited; especially Smith v. Ludlow*, 6 *Johns.* 267, *and Cady v. Shepherd, above cited.*

In the case before us, there does not appear to have been any evidence, aside from the admission of one of the surviving partners, tending to show any partnership dealing or transaction with the plaintiff during the existence of the firm. The first question propounded must therefore, as it applies to the present case, be answered in the negative. This, in our view, disposes of the case, and the second question propounded becomes abstract or hypothetical, and requires no answer.

The other Justices concurred.

J. Addison Lawyer and others v. Henry Smith.

Where a subscribing witness to a will was called to prove it upwards of thirty years after its date, and testified that he signed it as a witness, but that he had no distinct recollection of seeing the testatrix sign it: *Held* that questions to him whether, looking at the attestation clause, he had any doubt she signed it in his presence, and whether he ever witnessed an instrument in that form without knowing what it was, and whether he had any doubt that the persons whose names were to it were present at the time of its execution, were not incompetent, and that it was for the jury to give such weight to his evidence in answer thereto as they might think it entitled to under all the circumstances of the case.

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LAWYER *v.* SMITH.

After the death of the testatrix, a will twenty five years old was discovered, in a barrel among waste papers, and either torn or worn into several pieces, which were scattered loose among the papers in the barrel. Whether the injury to the instrument was done by the testatrix or by some other person, and if by her, whether accidentally, or intentionally and for the purpose of revoking the will, are questions of fact for the jury; and to aid them in determining these questions, and not as separate and independent evidence of a revocation, the declarations of the testatrix, made after the date of the will, that she had destroyed it, are competent evidence.

A legatee in a will is neither a party to the probate proceeding, nor one "in whose immediate and individual behalf" the proceedings are wholly or in part had, within the meaning of the statute; and is therefore a competent witness to sustain the will.

Heard April 17th, 18th & 19th. Decided July 9th.

Error to Washtenaw Circuit.

On November 17th, 1856, the defendant in error presented to the Probate Court of Washtenaw county, for probate and allowance, an instrument purporting to be the last will and testament of Gertrude or Gitty Fletcher, the wife of William A. Fletcher, bearing date June 11th, 1824, and made under an ante-nuptial agreement with her husband, of the date of November 28th, 1820. By this will, the testatrix bequeathed her personal estate to Peter Mann, Jacob Williams, and Isaac Hall Tiffany, upon trust within one year after her decease, provided her son John Tiffany should then be of age, and if not, then when he should reach the age of twenty, to pay and deliver the same to said John Tiffany, excepting a small legacy to her husband. But if said John should die without lawful issue, then said trustees were directed to pay and deliver one moiety of said personal estate to her niece Lovina Armstrong, and to divide the other moiety equally between said Lovina, and five other relatives who were designated, whenever they should respectively arrive at the age of twenty-one. And the said trustees were made executors of the will.

R. W. Nolton, Nelson Hempstead and John K. Starrin, were the subscribing witnesses to the will; it was signed by the testatrix at the end, and the following is the attestation clause: "Signed, sealed, published and declared, by the above named Gertrude Fletcher, to be her last will and

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testament, in presence of us, who have hereunto subscribed our names as witnesses in the presence of the testatrix."

On the hearing in the Probate Court, the plaintiffs in error appeared and opposed the allowance of the will, and the same having been admitted to probate, they appealed to the Circuit Court, where trial was had by jury, and the following among other evidence given:

Nelson Hempstead, testified that he knew Gitty Fletcher in her life time. "She resided in Esperance, N. Y. I can't tell the precise number of years she lived in Esperance, but she lived here several years. I became acquainted with her soon after she came here. I was acquainted with her till she left. I knew R. W. Nolton, and John K. Starrin: both resided here while she lived here. My name to the attestation clause is genuine. I am positive that Nolton's name is genuine. I am not so well acquainted with Starrin's hand writing: I have seen him write."

"When I put my name to the paper, Mrs. Fletcher (Gitty Fletcher), R. W. Nolton and Judge Tiffany were present, and John K. Starrin. It was done at Judge Tiffany's office, in the village of Esperance, according to the best of my recollection. My impression is that it was during the time Mrs. Fletcher resided in this village. I don't know as I recollect who called me in. I think Nolton and Starrin put their names to the paper at the same time, and I think the several persons I named before were all present at that time. My impression is that Mrs. Gitty Fletcher at the same time signed her name. I don't know whether she signed her name before or after the witnesses did. I was called in as a witness. My impression is that it was represented to us that it was her will. I don't know what her age was at that time. I should judge she was about thirty years old. She appeared to know what she was about, as far as I know. A part of the time while she lived here she kept a tavern where Mr. Morris now does. She kept boarders. She managed her business herself, according to my

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recollection. She did so with considerable tact and ability. I have conversed with her, and have heard her converse with others, on different occasions. She seemed to understand what she was talking about when I heard her converse with myself or others. When that paper was signed, she was in the enjoyment of her reason as perfectly as at any time while I knew her, at least. That is my impression. She was then capable of knowing the condition and extent of her property."

John K. Starrin, testified:

"I placed my name to that instrument (the will) where the same now appears.

Question: Did you see the will signed by Gitty Fletcher where her name now appears?

Answer: It is impossible for me to say. I have no distinct recollection.

Question: Look at the attestation clause of the will, and at your signature, and then state whether you have any doubt that Gitty Fletcher signed that will in your presence.

Objected to, as calling for the opinion and conclusion of the witness as to her signature; but the court overruled the objection.

Answer: I have not any doubt she signed it. I have no recollection that it was stated to me at the time what this paper was.

Question: Did you ever witness an instrument in the form you have there without knowing what it was?

Objected to, as irrelevant, incompetent and immaterial, but the objection overruled.

Answer: No sir.

Question: Have you any doubt that all the persons whose names appear to this will were present at the time it was executed?

Objected to, but the objection overruled and the witness answered — No sir."

Robert W. Nolton, testified:

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"I subscribed that will. I think my name appears where I placed it. I can't tell whether I saw Gitty Fletcher sign it. I have no recollection upon that subject.

Question: Look at the attestation clause and your signature to the will, and state whether you have any doubt as to having seen the testatrix sign the will.

Answer: I can't answer that question.

Question: Do you think that, at the time you signed this will, you knew what you were signing?

Answer, under objection: There is great probability that I did. I can't recollect any of the circumstances attending the execution of the will."

William S. Maynard, testified in substance as follows: "I first knew Gitty Fletcher in Ann Arbor. She came here 14 or 16 years ago: resided in the town of Ann Arbor. I was her guardian: I was appointed by the Judge of Probate of Washtenaw county six or eight years ago. She was removed from this state by John Feeck to his mother's in the state of New York. She afterwards returned to Michigan, and was taken to Brattleboro, Vermont, by me, to the Lunatic Asylum, and there detained by reason of her insanity. I know nothing of her death except by information by letter. I sent money to the superintendent of the Lunatic Asylum to pay her expenses there, as he requested. Sent him money to pay her funeral expenses since. I have not heard of her existence since."

John Tiffany, it appeared from the testimony, died in 1830.

The contestants, on their part, introduced the deposition of John Feeck, which was substantially as follows:

"I first saw the will in 1849, at Ann Arbor. There are some alterations in it. It is wafered up, and tape stuck in at the side, and I did not see that seal opposite the name of Gitty Fletcher there at that time, and I am quite positive there was no seal upon it at all. My strong impression is there was no seal. I first knew William

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A. Fletcher in Michigan in 1849. He died some two or three years after I first became acquainted with him."

The following, being a portion of the witness' answer to one interrogatory, was objected to by the appellee, and was ruled out by the court. "I have heard her (Gitty) say she had destroyed her old will, and was going to make a new one. I heard her say this first about the year 1841 or 1842. Then I heard her say it again the first time I went to Michigan in 1848."

The witness further said: "I went to Michigan again in 1849, and I fetched her and her effects along back with me to Schoharie; her clothing, bedding, and so on."

The following, being a portion of said witness' answer to an interrogatory, was also ruled out by the court. "I questioned her again, at that time, concerning her will. I was anxious to know something about it. She gave me the same answer as before, that she had destroyed her old will, and was going to make a new one."

The witness further said: "After I brought Gitty to Schoharie and left her with my mother, I went back to Michigan, and got consent of William S. Maynard, her guardian, to examine her papers. I searched for papers, and expected to find a will. I looked for papers in Mr. Maynard's house, in his store, and in a building near by his store; and in a barrel amongst a lot of waste paper, newspapers, pamphlets, and some old letters, I found the will. It was separated at the top, and was in a number of pieces; and the different pieces were scattered loose among the papers in the barrel. Some of the half sheets were separated in two pieces, and the last half with the signature was in three pieces. I gathered them up together, matched them so that I could tell how it read, fastened them at the top, and put them up, and kept them in my house a little over five years — five years and a half about — and then delivered the will to Dr. Joel Foster of the city of New York. The piece was torn

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out at the top of the will at the time I found it in the barrel, as it appears now."

To the cross interrogatory on the part of the appellee the witness said:

"The paper was the same when I delivered it to Dr. Foster with the exception of the seal. The tape and the wafers where the sheets are torn apart are as when I found it. I can state there was no alteration made of the seal at the right hand of the signature of Gitty Fletcher, after I found the paper, and before it was delivered to Dr. Foster. I also delivered to Dr. Foster an ante-nuptial contract between William A. Fletcher and Gitty, which I also found in the barrel. I will not be positive whether two of the half sheets of the will stuck together when I found the papers."

Daniel F. Allmendinger, a witness for contestants, testified:

"I was in Ann Arbor in 1826; moved here in 1830, and have lived here ever since. Knew Mrs. Fletcher; became acquainted with her in 1833 or 4, and did business for her. She frequently applied to me to do business for her; when she had fifty or a hundred dollars she would come to me to dispose of it. I have written a great many letters for her; perhaps twenty, thirty or more. I never knew her to write. I wrote the letters at her request. She had the greatest confidence in me. After John died, she had $200 in specie, with other things, sent her from New York in a box. Once she brought all her papers to me to examine them. I did examine them. I knew the amount of her estate within ten dollars. I frequently saw her papers, but never saw any will among them. She told me she had destroyed her will." To this last statement of the witness as to the destroying of the will objection was taken, and the court struck the evidence out.

"This conversation about destroying the will occurred more than once, and it was between 1835 and 1840. It was after the death of her son John."

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The counsel for contestants then put the following question to the witness:

Did she (Mrs. Fletcher) speak of making any disposition of her property—if so, what—in any of the conversations with you: If so, what did she say? Which question was objected to, and the objection sustained.

The witness further stated:

"She always complained of the death of her son. She would say, Oh, if my young one was only alive. She knew her son John was dead previous to 1836. I wanted a penknife that had belonged to John, and she would not let me have it. She always dictated the letters I wrote for her"

A letter was then produced, which the witness testified to having written at her dictation, dated Ann Arbor, March 28, 1844, directed I. H. Tiffany, and mailed to him by the witness, in which, among other things, she says: "My old will is destroyed, and I want you to make me a new one." This letter the contestants offered to read in evidence, or at least that portion thereof in reference to the destruction of her will; but objection being made, the court excluded it.

The witness further stated:

"Her valuable papers she always carried with her, and they were wrapped up and put in a basket, and she carried the basket wherever she went. She brought them to my home more than a hundred times, and during all my examinations I never saw a will among them. I examined her papers one, two, or three times a year, wholly or partially, up to 1840. I never found a will, or any thing purporting to be a will, among them."

On his cross examination, he said that he only once made an extensive examination of her papers. "I examined all she produced. She might have had others. There were notes, bonds, mortgages, contracts and papers about her matters. There was a paper something about her

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trustees. She had told me about that. I told her the contents of the papers just as it was. She took the papers and put them away. I presume she put them in her basket. She carried her documents with her — all her important papers."

Thomas C. Cutler, a witness for contestants, testified: "I lived in Ann Arbor since July, 1840. Knew Mrs. Fletcher. I was one of the appraisers appointed by the Judge of Probate to make inventory and appraisal of her property after Maynard was appointed her guardian. She was present when we commenced. She became so boisterous she was taken away to jail. We searched through her papers and effects to see if there was valuable papers. Most of which we opened were. Letters were found there in different places; some in drawers, chests, boxes, and barrels, and in a barrel there were newspapers of every description. Some things packed away very improperly; in one place found with the papers a crock of rancid butter; and all papers we thought of consequence we took to Maynard's, to the wooden building, and he took charge of them. This was in 1849 or 1850. The examination of her property and the inventory were made at the dwelling house she had occupied for many years. John Feeck was present all the time, and was there alone some of the time. She had been deranged for some time, and lived there alone."

On his cross examination he said, he found the papers scattered and mixed promiscuously with other things. No one place in particular for any thing. In the middle of a chest packed with bed clothes, we found some some money tied up. "If I had noticed a will I should have taken care of it. As far as I made an examination it was thorough. I do not know how Fletcher and Feeck did; what they looked over I did not. I did not examine half the papers."

On his re-examination he said "the money found in

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the chest was $150, $160 or $170. Maynard took all the papers that were considered valuable from Mrs. Fletcher's hands when she was leaving. They were all together tied up in a rag, and in a basket. They were inventoried a week after. We found no papers of any value outside of that bundle that we inventoried. I speak of money securities, notes, &c."

William S. Maynard, testified:

"I don't recollect where the money securities were found. I know I took the basket from Mrs. Fletcher, and handed it over to Cutler. She kept the basket about her person. There were silver spoons in it. I did not personally make much search for valuables, but my impressions are that all her valuables were in the basket I did not search the other things. All else was badly strewn around. I left them with the others. I looked over the papers afterwards at my place: saw correspondence with Tiffany, Fletcher, Eacker and others, after John Feeck came here and asked to examine the papers. He took Mrs. Fletcher east at my request, and returned. I gave him permission to look at the papers in the barrel in my old store, and he did. Mr. Morgan was one of the appraisers, to whom I delivered the basket with the valuable papers. E. T. Williams, was another of the appraisers. Mr. Cutler, I think, done most of the work. I found nothing that purported to be a will."

On his cross-examination he said: "I had looked at the papers before Feeck came back. Examined them, but not very closely. The papers were carried up stairs in a shawl. Carried some into the parlor, and looked at them myself. Left them with Feeck. I did not know that Feeck took away any of the papers. I let him have a mortgage which he said belonged to his mother. Feeck never asked me to let him take away any papers."

On his re-examination he said, "the papers that were examined in the parlor were the mortgages, notes, &c.

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of value, belonging to Mrs. Fletcher. Feeck had permission to examine every thing in the old store. It was only of value as waste paper, as it was old trash."

Considerable other evidence was offered by contestants of statements made by the testatrix, relative to the destruction of her will, and to some contemplated disposition of her property; and also certain letters, proved to be from her, bearing dates from 1839 to 1846, all of which had relation to her property, and tended to show what disposition she proposed to make of it since the death of her son; all of which were excluded by the court.

The appellee also called John Foster, who had married Lovina Armstrong, the principal legatee; who was permitted to be sworn and to give material evidence, under an objection by the contestants to his competency.

It was made a question on the trial, whether the domicil of the testatrix was in New York or Michigan, at the time of the execution of the will; but this becomes immaterial under the view taken by the court.

The jury having returned a verdict sustaining the will, the contestants brought error.

O. Hawkins, and *C. I. Walker*, for plaintiff in error:

To the point that the court erred in excluding the declarations and letters of the testatrix as bearing on her intention to revoke, they cited:—2 *Yeates*, 170; 2 *Dall.* 266; 3 *Curteis*, 626; 1 *Curteis*, 581; *Ibid.* 505; 1 *Phill.* 461; 2 *Wm. Black.* 1043; 6 *Ad. & E.* 209; 2 *Hagg.* 266; 4 *S. & R.* 297; 2 *Bradf.* 281; 1 *How.* (*Miss.*) 336; 1 *Ala.* 474; 1 *Jarm. on Wills*, 159, *note* 1. That the will being found among waste papers, the legal presumption is that it was rightfully there, and that the testatrix intended to cancel the same; and this legal presumption stands good until rebutted by proof:—2 *Barr*, 110; 11 *Vt.* 125; 14 *Ala.* 474; 2 *Rich.* 184; 2 *Dall.* 286; 6 *Wend.* 173.

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Henry Smith, (*of Albany, N. Y.*), for defendant in error:

The manner in which a will may be revoked is prescribed by statute, and where it is claimed that the will has been revoked by some act of the testator *amino revocandi*, declarations are inadmissible to show the *animus* unless a part of the *res gestæ*:—1 *Kern.* 157; 4 *Cow.* 483; 6 *Cow.* 377; 2 *Johns.* 31; 1 *Gall.* 170; 5 *Bing.* 435.

The declarations offered (and the letters are no higher evidence than oral statements) were not a part of the *res gestæ*. Declarations, to become a part of the *res gestæ*, must have been made *at the time of the act done*, which they are supposed to characterize; and have been well calculated to unfold the nature and quality of the facts they were intended to explain, and so to harmonize with them as obviously *to constitute one transaction*:— 3 *Conn.* 250; 9 *Paige*, 611, 617; 1 *Greenl. Ev.* § 108.

There is nothing in the pretence urged on the trial that the facts proved warranted the inference that the testatrix produced that condition of the will in which it appeared, and that in the absence of direct testimony as to how this condition was produced, the same could be proved by her declarations. This would allow them to show both the act of destruction, and the *animus*, by declarations; when by law they can not even prove declarations to show the *animus*. And such a rule would entirely annul the statute, and allow a revocation of a will to be established by mere declarations, without any proof of *the act* of cancellation or destruction.

No violence to the will amounts of itself to a revocation; and when (as in this case) the person's will was found in a smeared and lacerated condition, and the evidence shows that when the will was found the testator was of unsound mind, no inference against the will, or in favor of a revocation, arises. Wills found under circumstances much more unfavorable than this, have been established:—1 *Phill.* 71; 7 *Johns.* 394; 11 *Wend.* 227.

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MANNING J.:

The will was made and executed in the state of New York; but it is of no importance whether it was executed there or in Michigan, or whether the testatrix at the time was a resident of New York or Michigan, as the law of each state was complied with in its execution. Nor was there any error in admitting the depositions of Nolton, Hempstead, and Starrin, the witnesses to the will, to go to the jury as evidence of its execution and publication by the testatrix. It could not be expected, after the lapse of thirty years, they should recollect all the particulars attending the execution. It was for the jury to give such weight to their evidence as they might think it entitled to, under all the circumstances of the case.

But the judge erred, we think, in refusing to receive evidence of the declarations of the testatrix that she had destroyed her will, and in not admitting a letter of hers, stating her will was destroyed. Such evidence is not admissible as proof in itself of a revocation, for the statute provides, "no will, nor any part thereof, shall be revoked unless by burning, tearing, cancelling or obliterating the same, with the intention of revoking it, by the testator, or by some person in his presence and by his direction;" "or by some other will, codicil or other writing executed in the manner provided for the execution of a will:" —*Comp. L.* § 2833. The first we hear of the will after its execution in 1824, is the finding of it by Feeck in 1849, "in a barrel among a lot of waste paper, newspapers, pamphlets, and some old letters." He says, "it was separated at the top, and was in a number of pieces, and the different pieces were scattered loose among the papers in the barrel." It consisted of a number of half sheets of paper, some of which were separated in two pieces, and a piece was torn out at the top. He gathered them up, matched them, and fastened them at the top, and kept them in his possession five and a half years. A will found as this was, in a barrel among old

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letters and other papers of no account, and in the mutilated condition stated, needs some explanation of these circumstances to admit it to probate. The piece torn out at the top and the separation of the half sheets can not be accounted for by the age of the instrument. They are evidence of violence, or an intentional injury to the instrument; but whether done by the testatrix or some other person; and if done by her, whether accidentally, or intentionally and for the purpose of revoking her will, were questions of fact to be determined by the jury. To aid them in arriving at a correct conclusion on these points, and not as separate and independent evidence of a revocation, we think the declarations of the testatrix should have been permitted to go to the jury, for what they were worth, under all the circumstances. See opinion of Chancellor Walworth, in *Betts v. Jackson*, 6 *Wend.* 173.

Foster was a competent witness for the will. Neither he or his wife, who is a legatee, is a party to the suit. His wife was interested in the matter in question, or in the event of the suit. But that is no disqualification under the statute, unless the suit is prosecuted "wholly or in part, in the immediate and undivided behalf" of his wife. In *Freeman v. Spalding*, 2 *Kern.* 372, it was held, under a like statute, that a residuary legatee was a competent witness for the executor, in a suit brought to recover a debt due the estate: — *Bank v. Palmer*, 2 *Sand.* 686; *Hart, Admr. v. Stephens*, 6 *Q. B.* 937; *Hill v. Kitching*, 3 *M. G. & S.* 299.

Judgment reversed and a new trial granted.

The other Justices concurred.

Francis X. Cicotte and another v. Lysander Morse.

While the rules of pleading applied to Justices' Courts are extremely liberal, a cause of action must be as fully proved in those courts as in any other.

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CICOTTE *v.* MORSE.

Where a justice of the peace, in return to a certiorari, certifies the evidence as follows: "I do certify the following to have been the evidence before me in the above entitled cause," and the objection taken before him was that certain necessary facts had not been proved; *Held* that it must be presumed that the whole evidence is returned.

Where, in cases removed from Justices' Courts by certiorari, the court below has found facts upon pertinent evidence, this court will not review that finding. But no court has a right to assume a fact without any evidence legally tending to prove it, or to dispense with the proof of any distinctive condition affixed to an agreement.

Proof of any one or more of the legal conditions necessary to charge an endorser, has no tendency whatever to prove a compliance with the rest.

Submitted on briefs April 21st. Decided July 9th.

Error to Wayne Circuit.

The action was assumpsit, brought by defendant in error before a justice of the peace. The judgment of the justice in his favor was removed to the Circuit Court by certiorari, and being affirmed by that court, was brought here by writ of error.

The return of the justice of the peace, after setting forth the issuing, service and return of process, is in the words following:

"And I do also certify that, at the time and place above specified for the return of said summons, the parties appeared before me, and the plaintiff declared against the defendants as follows: That on the 18th day of June, 1857, James Cunningham made a promissory note, payable to his own order, and endorsed the same, and that the defendants, John Bacon and Francis X. Cicotte, endorsed the same, whereof they became liable to pay, and that the same was made payable at the office of C. & A. Ives; and when the same became due and payable, the maker thereof refused to pay, of which the endorsers had notice: which said note and notice of protest was placed on file in evidence.

"Defendants, by their attorney, demur to the declaration, for the reason that the said declaration shows no cause of action against the defendants, for any amount of money whatever, or any such presentment as makes

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them liable to pay; which demurrer is overruled by the court.

"C. J. Church and Samuel Denton sworn on the part of the plaintiff; James M. Hollywood and James E. Whalen sworn on the part of defendants. After hearing the proofs and allegations, the court renders judgment in favor of the said plaintiff, and against the said defendants, for $150 damages, and the costs of suit, taxed at $5, this 25th day of November, 1857.

"I do certify the following to have been the evidence before me in the above entitled cause.

"*Charles J. Church, sworn:* I am a Notary Public. Was such on 17th day of September last. As such notary I presented the said note at the office of C. & A. Ives on the 19th day of September last, for payment, and I notified James Cunningham by putting a notice in the post-office, directed to Cleveland, Ohio; also by leaving a notice at the residence of John Bacon, directed to him. Also notified Mr. Cicotte by leaving a notice at his office (in writing) in Detroit. My fees as Notary are $1.25. I left the notice for Mr. Cicotte at the Sheriff's office in the Circuit Court building, where I was informed Mr. Cicotte kept his office.

"*Cross examination.* I do not know at whose office left Mr. Cicotte's notice, except as I was informed. I can not say who told me. I do not know that he resides in Detroit. I do not know E. V. Cicotte, the sheriff. All I know of Cunningham is what I was told. I do not know that I ever saw Cicotte in his office."

Then follows the testimony of Denton and Hollywood, which related to the signatures of the parties, and the transfers of the note, and that of Whalen, who testified that he knew Cicotte's residence, corner of Fort Gratiot and Brush streets, in Detroit.

H. D. Terry for plaintiffs in error:

The declaration is insufficient. There is no averment

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of a refusal to pay, or of notice of presentment and refusal to plaintiffs in error: — 1 *Mich.* 352; *Chit. Pl.* (11 *Am. Ed.*) 328; 17 *Mass.* 229.

There was no proof of a sufficient notice to either Bacon or Cicotte. It does not appear, by any proof in the cause, what the notices given to the endorsers contained. The testimony is silent on that point. A mere notice of protest is insufficient: — 1 *Doug. Mich.* 296.— The notice should set forth the fact of presentment and refusal: — *Story on Notes*; §§ 348, 350; *Edw. on Bills*, 470 471, *and cases cited*; 4 *B. and C.* 339; 2 *Hill*, 587.

There was no sufficient proof of any service on Cicotte. *Story on Notes*, § 312; *Bailey on Bills*, 256; 11 *Johns.* 231; 16 *N. Y.* 235; 2 *Pet.* 100; 6 *La. Ann. Rep.* 100.

Maynard and Meddaugh, for defendant in error, argued that with the correctness of the judgment, so far as it relates to the evidence, this court will not interfere: — 1 *Mich.* 259; 10 *Wend.* 412; 5 *Mich.* 532. They therefore only discussed the question whether the declaration was sufficient, to which they cited, 4 *Wis.* 249; 3 *Mich.* 460; 10 *Johns.* 104; 1 *Denio*, 432; 4 *Denio*, 175; 3 *Caines*, 152; 2 *Mich.* 276; 23 *Ala.* 652. The statute authorizes declaration on a note on the money counts alone, with copy of the note attached; and the one in this case, the note being filed with the justice as a part of it, was much more specific and full than if on the money counts.

CAMPBELL J.:

The rules of pleading, when applied to justice's courts, have always been extremely liberal, and we are not disposed to regard the declaration in this case as insufficient.

But a cause of action must be as fully proved in one

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court as in another. And facts which can not be regarded as tending to prove others which are material and necessary to establish a cause of action, can not before a justice, any more than at the circuit, be regarded as sufficient to fix a liability.

To charge an endorser, for example, several distinct things are necessary, no one of which can be disregarded, and no one of which can, therefore, when proved, raise any presumption of another. These facts to be proved are not only the making of the contract of endorsement, but presentment of the note at maturity for payment, a neglect or refusal to pay when presented, a notice giving a sufficient description of the note and distinctly showing its dishonor, and service of such notice within the proper time personally, or at the residence or place of business of the endorser, or by mail where it is properly mailable. These are all legal conditions, which, unless waived, must be strictly complied with, in order to charge the endorser at all. And proof of performance of any one or more of these conditions has no tendency whatever to prove a compliance with the rest.

In the case before us it is not seriously claimed that all these conditions, necessary to charge the endorsers, have been proved. But it is claimed that this court has decided that, in such cases, we can not weigh the testimony, and determine whether it establishes any fact satisfactorily or or not. It is undoubtedly true that, where the court below finds facts upon pertinent evidence, we cannot review that finding in this way. To the cases heretofore decided by us on that point we are entirely disposed to adhere. If there is any evidence tending to prove a fact, and the court below regards it as proved, we cannot say it should have required more. But no court has a right to assume a fact without any evidence legally tending to prove it, or to dispense with the proof of every distinctive condition affixed to an agreement. And where a court holds that an endorser may be charged without legal notice, it is an error of law, and not a mistaken view of facts.

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The justice has certified the evidence in the following terms: "I do certify the following to have been the evidence before me in the above entitled cause." The objections taken before him, were, that necessary facts had not been proved. We must assume that we have the whole case. And as the endorsers are not shown to have been legally charged, the judgment must be reversed with costs.

CHRISTIANCY J. concurred.

MANNING J. dissenting:

It is objected the declaration does not state that payment of the note was demanded, at the office of C. & A. Ives, when it became due, and notice thereof was given to the defendants.

The statement of the declaration is, that the note was made payable at the office of C. & A. Ives, and that when it became due and payable the maker thereof refused to pay, of which the defendants had notice. This is sufficient in justice's court, where the pleadings, at the election of the party, may be either written or verbal, with the exception of notices of title to land, which must be in writing:— *Comp. L.* § 3714. The broadest intendment is always made in favor of such pleadings, and it is to be inferred from the declaration that the note, when it became due, was presented at the office of C. & A. Ives, and payment demanded. In *Barbour v. Taylor*, 1 *Mich.* 352, the plaintiff exhibited the note, and stated that he declared on it against defendant as indorser. There was no statement of non-payment by the maker, or notice to the indorser.

The evidence on which the justice rendered judgment can not be reviewed on a writ of error. It was so held by this court in *Miller v. Chaffee*, 1 *Mich.* 257; and *Elliot v. Whitmore*, 5 *Mich.* 532. I think these decisions right in principle, and see no good reason for overruling them. I think the judgment should be affirmed.

MARTIN CH. J. did not sit in this case.

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William H. Waldby v. Genevieve Callendar.

The provision in the tax law of 1858, which attempts to confer upon Circuit Court Commissioners the power to adjudicate upon tax titles, is unconstitutional and void.

Submitted on brief July 6th. Decided July 9th.

Certiorari to the Circuit Court Commissioner for Allegan county.

On April 23d, 1859, Genevieve Callendar presented to said Circuit Court Commissioner a petition, under §101 of the tax law of 1858, to have certain tax titles held by one Merchant, upon land claimed by her, set aside and annulled. Plaintiff in error, who held a mortgage given by Merchant, was made a party respondent to said petition, and proceedings having been had before the Commissioner in conformity with the section mentioned, the Commissioner rendered judgment that the prayer of the petition be granted, and the tax deeds annulled.

T. M. Cooley, for plaintiff in error:

The Legislature can not, under the Constitution, confer upon Circuit Court Commissioners the power which this act attempts to give.

That the power is judicial is too clear to need argument, or the citation of authorities. The decision of the Commissioner is called a *judgment* by the act (§101): it determines the title: it is a substitute for the action of ejectment (§90): it is final unless appealed from: the commissioner does not report to the Circuit or any other court: and the Circuit Court gets no jurisdiction of the proceedings except by *appeal*. The power is not only a judicial power, but a judicial power of the highest importance, determining finally controversies with respect to property, to any amount or value.

It is a power not exercised with respect to any suit *in court*.

It is not possessed by Circuit Judges at chambers, and does not relate to chamber duties.

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It was not possessed by commissioners at the adoption of the Constitution.

The act therefore does not come within any of the decisions of this court with reference to the power of commissioners, and there can really be no question of its invalidity.

There was no appearance for defendant in error.

MARTIN CH. J.:

By § 101 of act No. 32 of the session of 1858, (*S. L. pp.* 186, 189) the Legislature attempted to confer upon Circuit Court Commissioners judicial powers equal to the combined powers of courts of law and of equity. By § 16 of Art. 6 of the Constitution, the Legislature could only invest these officers with powers not exceeding those of a Circuit Judge at chambers; and this attempt to clothe them with these superior powers, is in direct conflict with this constitutional provision.

The judgment of the Circuit Court Commissioner is reversed, with costs.

The other Justices concurred.

Henry J. Koster v. The People.

Where a statute enumerates several elements as combining to create a crime, the crime cannot properly be described without including all these elements.

Under the statute which punishes "every person who shall break and enter, in the night time, any office, shop, railroad depot or warehouse, not adjoining to or occupied with a dwelling house," with intent to commit a felony, an information which fails to describe the building entered as "not adjoining to or occupied with a dwelling house," is fatally defective.

Submitted on brief July 5th. Decided July 9th.

Error to Ionia Circuit.

Plaintiff in error was convicted on an information which

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charged that he, "on the 13th day of April, in the year of our Lord one thousand eight hundred and fifty-nine, about the hour of ten o'clock in the night time of the same day, with force and arms, at the township aforesaid, in the county aforesaid, the storehouse of one John Vaughn, there situate, feloniously and burglariously did break and enter, with intent the goods and chattels of the said John Vaughn, in the said storehouse then and there being found, then and there feloniously and burglariously to steal, take, and carry away; and a large quantity of pork, of the value of six dollars, of the goods and chattels of the said John Vaughn, in the said storehouse then and there feloniously and burglariously did steal, take and carry away, against the form of the statute," &c.

Bell & Soule, for plaintiff in error.

There was no appearance for the People.

CAMPBELL J.:

The statute under which this prosecution is had punishes "every person who shall break and enter, in the night time, any office, shop, railroad depot or warehouse, not adjoining to or occupied with a dwelling house," with intent to commit felony.

It is a plain principle of law, that where the statutes emmerate several elements as combining to create a crime, the crime can not properly be described without including all these elements. An entry into a shop or warehouse in the night, with intent to commit a felony, is not a crime under this statute unless it also appears that the shop or warehouse is neither adjoining to nor occupied with a dwelling. Burglary at common law must be committed in such a place as is within the definition of a dwelling, which term has received an enlarged signification. Entering other buildings was not regarded in the same light. In making a new crime, the Legislature have

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seen fit to select a peculiar class of buildings; and it can not be enlarged or varied.

The information is defective in not setting forth any offense known to our laws; and the judgment was therefore erroneous, and must be reversed.

MANNING & CHRISTIANCY JJ. concurred.

MARTIN CH. J. was absent.

William P. Moore v. Simon Mandlebaum.

One acting as agent for the owner of property, has no right to make himself the agent of others for the purchase of the property, nor to take any advantage of the confidence his position inspires to obtain the title himself.

Nor can such agent make a valid purchase from his principal without fully and fairly disclosing all the propositions he has received, and all the facts and circumstances within his knowledge, in any way calculated to enable the principal to judge of the propriety of the sale.

Where an agent for the sale of lands entered into an arrangement with third persons to purchase the lands jointly with them, for a certain price, if on examination he should think best, and they advanced him money which they authorized him to pay the owner for the refusal of the land until an examination could be made; and he, without disclosing this arrangement, represented to his principal that he had agreed to sell the lands for a less price; that that was all he could obtain; and that it would be necessary for him to have the title thereto in order to carry into effect the sale; and on these representations obtained to himself a deed of the lands, paying the owner the money so advanced to him, and giving his mortgage without personal obligation for the balance of the price at which he stated he had agreed to sell; but taking back a receipt for the money so paid, the condition of which was that in case the mortgage should not be paid when due, the land should revert to the principal, and the down payment be forfeited; *Held* that the facts constituted a fraud upon the principal, which would authorize him to disaffirm the conveyance.

The land, in such case, in equity and good conscience still belonged to the principal. The effect of the transaction was to place it in the hands of the agent, subject to a trust in favor of the principal by operation of law. And it is competent to prove by parol the facts which create this trust.

And the arrangement between the agent and such third persons having fallen through, and the agent having subsequently sold the land to a bona fide purchaser, for a sum larger than the amount of his payment and mortgage; and conveyed the same, so that the principal was precluded from disaffirming his deed, as well as from enforcing the trust as to the land; *Held* that he was entitled to recover from the agent, in an action for money had received, the difference between the price received by the agent, and the amount of his payment and mortgage.

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The action in such case falls substantially within the rules applicable to actions brought by a principal against his agent for money received by him on the sale of the principal's land. It is not brought to recover back the consideration paid on a contract rescinded, and the plaintiff is under no obligation to tender back what he has received before bringing suit.

No provision of the Statute of Frauds conflicts with such a suit. It is not brought on a parol contract required by the statute to be in writing, nor upon any express contract whatever; but on a duty on the part of the defendant which the law recognizes as springing from the whole transaction.

Though the plaintiff in such case might proceed in equity for the purchase price, on the ground of a trust, and be entitled to a discovery, yet he may, if he see fit, waive his right to a discovery, and proceed at law; taking upon himself the risk of being able to prove his case without the discovery.

As a general rule, when money has been received by a defendant under any state of facts which would, in a court of equity, entitle the plaintiff to a decree for the money when that is the specific relief sought, the same state of facts will entitle him to recover the money in an action of assumpsit for money had and received.

Heard June 1st, 2d and 5th. Decided July 9th.

Error to Wayne Circuit.

The action was upon the common counts in assumpsit. The plaintiff claimed to recover of defendant the sum of $13,000 as money had and received by the latter to the use of the plaintiff, on or about August 25, 1853, and interest thereon from that time, as part of the purchase price of certain lands in Houghton county hereinafter described, which it was admitted the plaintiff had owned on and previous to March 23, 1853.

On the trial before a jury, the plaintiff gave in evidence a power of attorney from himself to the defendant, authorizing the latter to sell and convey the said lands for such price as he should think proper; which power of attorney bore date March 23, 1853, and was shown to have been delivered at about its date, to defendant, who immediately sailed for England.

It further appeared that, while in England, the defendant entered into an agreement with Charles M. Wilkins, A. H. Sibley and S. E. Low, which was produced and proved, and read in evidence, as follows:

"This memorandum of agreement, made the twenty-first day of April, 1853, between Charles M. Wilkins, of

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30 Bucklersburg, Alexander H. Sibley, of 19 Duke street, St. James, Samuel Eams Low, of 13 Kings Arms Yard, London, and Simon Mandlebaum, of Eagle River, Lake Superior, *witnesseth:*

That said Mandlebaum is by power of attorney from William P. Moore, bearing date the 23d March, 1853, duly authorized to dispose of a certain tract of mineral ground described as follows, *viz:* about 80 acres in section 19, 400 acres in section 30, and 160 acres in section 29, town 55 range 33 west, being in all 640 acres of mineral land on Portage Lake, Lake Superior; that the purchase price of the said tract is ten thousand pounds; that in order to secure the said tract, it is agreed that said Mandlebaum shall, if necessary, pay to the owner of the said tract £500 for a refusal during a period of six months; that the refusal being obtained, said Mandlebaum is authorized to draw on Wilkins, Truefit & Co., of 30 Bucklersburg, London, the following sums, *viz:* £500 at one day's sight, £500 at ten day's sight, £500 at twenty days' sight, £500 at thirty days' sight, and £500 at sixty days' sight, making in all the sum of £2,500, which drafts said Wilkins agrees shall be duly honored on presentation, and paid at maturity. The advance of £2,500 thus made by said Wilkins, is for the purpose of enabling said Mandlebaum to pay the sum of £500, if necessary, for the refusal aforesaid, and £100 for a preliminary examination of the tract. This sum of £600 is the entire amount of absolute outlay that the parties hereto agree to expend; the said sum being deemed sufficient to fairly test the quality of the mineral ground, and enable the said Mandlebaum to decide whether the purchase of the tract shall be made or not. Should the examination of the ground prove unsatisfactory, and the said Mandlebaum should in consequence decline to purchase, then the sum of £2,500 advanced by said Wilkins, shall be returned to him by the remaining parties to this agreement, so soon

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as the decision of said Mandlebaum not to purchase the said tract is communicated to said Wilkins in London, excepting however, the sum of £150, which is one-fourth part of the preliminary expenses incurred in this undertaking, and which sum said Wilkins agrees absolutely to relinquish in the event of the purchase of the tract not being made, or otherwise a fourth part of any less sum than £600 that such preliminary expenses may amount to

If after the investigation of the property by said Mandlebaum he shall be satisfied with the same, he shall forthwith enter upon a contract with the owner of said tract for the purchase thereof, for a sum not exceeding £10,000 (ten thousand pounds), and the said Mandelbaum shall bind himself to pay the owner aforesaid the £2,000 advanced by said Wilkins, and shall immediately send the title deeds of the property to London, where they shall be placed at the disposal of said Wilkins, who shall conjointly with the other parties to this agreement proceed to form a company with ample capital to pay off the balance of the purchase money within the time specified by the contract, and for the efficient working of the mineral tract aforesaid.

When the whole amount of the purchase money shall have been paid, then out of the first moneys received thereafter said Wilkins shall be reimbursed his advance of £2,350, and all profit over and above this sum, whether in money or in shares, shall be equally divided between the parties to this agreement so soon as such money and such shares are paid over by the contemplated company. It is agreed that any loss growing out of this undertaking shall be borne equally by the parties signing this agreement." [Signed by the parties.]

The counsel for said plaintiff then produced witnesses by whom he offered to prove:—

That said Mandlebaum accepted said power of attorney, and agreed to act as such agent, and to use his best en-

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deavors to sell and dispose of said lands as therein and thereby authorized, but was expressly instructed by the plaintiff not to sell said lands for less than Columbus C. Douglass should estimate them to be worth, and was at the time informed that said Douglass, by a written certificate, estimated them to be worth thirty thousand dollars; that after the signing of said memorandum of agreement in London, and before leaving there for Michigan, the said Wilkins, Sibley and Low, placed in the hands of said Mandlebaum the sum of at least two thousand dollars, for the purpose and with the intent that he should, as mentioned in said agreement, obtain therewith the refusal of said lands for six months:

That the said defendant then returned to Detroit, where he arrived on or about the tenth day of May, in the year aforesaid, having said memorandum of agreement in his possession; that on that day he had an interview with the plaintiff in Detroit, in which interview he represented to the plaintiff that he had been in London; that he had there sold or agreed to sell to certain persons (not naming them), the said lands, for the sum of $22,000; that that was the most he could get for them owing to the fact that said Douglass' certificate and estimate of their value was not sufficiently full and explicit; that he had received from said persons $2,000 down as part payment for said lands, and was ready to pay over the same to the plaintiff; that by his arrangement made with said persons it was necessary for him to have an absolute deed for said lands, to enable him to consummate the bargain; that in order to insure to the plaintiff the payment of the remaining $20,000 by said persons within six months, he would himself execute back to said plaintiff a mortgage on said lands, conditioned to pay him the $20,000 within six months; and that unless said parties should pay said plaintiff said sum within that time, the said Mandlebaum would reconvey the lands to said plaintiff, and that said sum of $2,000 should, in that case, be forfeited.

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And plaintiff's counsel further offered to show that said defendant did not in said interview, nor at any time thereafter, make known to plaintiff the fact that he had entered into such agreement; and that he had agreed with said Wilkins, Sibley and Low not to make said memorandum of agreement, or the contents thereof, known to said plaintiff.

And the plaintiff's counsel further offered to prove that said plaintiff, being deceived as to the true state of the facts as exhibited by said agreement, and by the false representations made to him by said defendant, consented to accept said $2,000, and to give defendant an absolute deed of said lands for the purpose of enabling him to carry out and consummate the pretended arrangement with said persons in London: that said deed was executed, acknowledged and delivered accordingly, and that said Mandlebaum executed, acknowledged and delivered to said plaintiff, a mortgage on all said lands, of the same date, conditioned for the payment of $20,000 in six months from its date; that no bond, note or other security was given by said Mandlebaum to which said mortgage was collateral:

That at the same time, at the request of said Mandlebaum, and as a part of the same transaction, said plaintiff gave to him the following receipt:

"Received, Detroit, May 10th, 1853, of Simon Mandlebaum, Esq., two thousand dollars, being part of the purchase money of certain lands in the county of Houghton, state of Michigan, which I have this day conveyed to said Mandlebaum, and on which he has given me a mortgage conditioned for the payment of twenty thousand dollars in six months from the date hereof; and in case of failure on the part of said Mandlebaum to pay the said sum of twenty thousand dollars at the time mentioned in said mortgage, the lands conveyed to revert to me the said Moore, and the sum of two thousand dollars men-

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tioned in this receipt to be forfeited and remain the property of me, said Moore, the same being liquidated damages for the failure of said Mandlebaum to fulfil the conditions of the mortgage aforesaid.

WILLIAM P. MOORE."

The plaintiff's counsel further offered to prove that immediately after the giving of said deed, mortgage and receipt, said Mandlebaum drew five drafts upon Wilkins, Truefit & Co., London, to the amount of £2,500, founded upon the said articles of agreement, and sent said drafts forward for collection, but all which drafts were returned protested for non-acceptance and non-payment:

That the said defendant fraudulently concealed from the plaintiff the drawing and transmission of said drafts, and that said plaintiff had no notice or knowledge thereof, until long after the 26th of August following.

The plaintiff's counsel further offered to show, that on the 24th day of August, 1853, the said defendant sold and conveyed by warranty deed of that date, to one Henry Weld Fuller for the Ripley Copper Company, all the said lands, for the following consideration, to wit: said company was to pay the defendant down the sum of fifteen thousand dollars, and to pay off the said mortgage of twenty thousand dollars thus given to plaintiff; which sum of fifteen thousand dollars the said company paid to defendant on the 25th day of August, 1853.

All which offers of evidence were rejected by the Circuit Judge, and plaintiff excepted.

Judgment having passed for the defendant below, plaintiff brought error.

J. M. Howard, for plaintiff in error:

Mandlebaum held the title to the land in trust merely, and for the purpose of carrying out a contract he had made as the agent of Moore. There is no pretence that Mandlebaum as purchaser paid any thing for the land, or

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that Moore treated with him as a party. He treated with him only as his *agent;* placing in him the utmost trust and confidence, and implicitly believing all he said. He agreed to fulfill a bargain for Moore, which he said he had made under Moore's power of attorney; and Moore in giving the absolute deed, innocently supposed he was carrying out that bargain as an honest and honorable man should. He gave the deed for *that purpose, and for no other.* The $13,000 then belongs to Moore. It was the proceeds of *his* land. The land was to remain his until the London parties should pay him $20,000 mentioned in the mortgage, and if Mandlebaum sold to others in violation of his agency, no proposition of law can be clearer than that the proceeds belonged to his principal:— *Story on Agency,* § 214; 1 *Pars. on Cont.* 74, 75.

Mandlebaum obtained the deed by fraud. It was therefore void:— 13 *Pet.* 36. But he passed the title over to an innocent purchaser, thus rendering it impossible for Moore to reclaim the land. We sue for the $13,000 upon the implied promise raised by the law that he shall pay it to us as a part of the proceeds of our lands. That the action lies, see 10 *Wend.* 436; 2 *Cush.* 226; 4 *Mass.* 488; 17 *Pick.* 545; 2 *Burr.* 1005; 2 *B. & B.* 369; 1 *Chit. Pl.* 352; 3 *Taunt.* 274; *Cowp.* 197; 5 *Cush.* 126; 18 *N. Y.* 546; 1 *Sumn.* 277, 317; 3 *Dall.* 357; 19 *Conn.* 548; 9 *M. & W.* 54; 4 *M. & Gr.* 11; 4 *Gray,* 518; 36 *E. L. & E.* 424; 18 *Ill.* 228.

A. B. Maynard, A. Pond, and *H. H. Emmons,* for defendant in error:

1. The evidence offered was inadmissible to show that defendant received and held the title to the land as agent of the plaintiff, and not in his own right. This would be an attempt to "create" or prove an express trust in lands by parol evidence, in violation of the statute of Frauds:— *Comp. L.* § 3177; *Lead. Cas. in Eq. Vol.* 2 *pt.*

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1, 529, *et seq.*; 4 *Russ.* 423; 5 *Johns. Ch.* 1; 5 *Cush.* 90; 2 *Green Ch.* 362; 4 *W. & S.* 149. The prior existence of the relation of principal and agent can in no way vary the case. The power of attorney was executed long prior to the deed and mortgage. They do not refer to each other, and have no necessary or natural connection. So far as the establishment of an express trust is concerned, the case stands as if the only writings executed were the deed, mortgage and receipt.

2. The evidence was inadmissible to show that the deed was obtained by fraud, since fraud in the consideration of a deed can not be shown at law to avoid it: — *Pow. on Cont.* 200; 2 *Kent*, 464; 13 *Johns.* 430; 5 *Cow.* 506; 8 *Cow.* 290; 9 *Cow.* 307; 12 *Johns.* 327; 4 *Wend.* 471; 5 *Cow.* 509; 1 *Zab.* 18; 1 *Dutch.* 482; 6 *Munf.* 358; 2 *Rand.* 426; 1 *Jones*, 360, 168; 3 *Ired.* 310; 7 *Ind.* 155; 1 *Dev. & Bat.* 492; 4 *Harr.* 357; 4 *Ala.* 300; 27 *Ala.* 203; 1 *Mo.* 100, 446; 6 *Mo.* 59; 1 *J. J. Marsh.* 141; 3 *Blackf.* 170; 14 *S. & R.* 206; 4 *Mass.* 487; 16 *Mass.* 348. On the trial below, counsel insisted that they did not seek to avoid the deed, but only to show fraud on the part of defendant, and that he had received the money in consequence of the fraud. But he could claim the money on no other ground than that the deed was, as between the parties, *void*, so that defendant held the title, and sold and received the purchase money, as agent or trustee for plaintiff. If defendant had, by fraud, obtained money from the plaintiff, the case would be entirely different. Upon no theory can this money be held to belong to the plaintiff unless the property producing it belonged to him; which in this case can not be said without avoiding the deed.

3. If the deed could be avoided in a court of law for fraud in the consideration, plaintiff could not maintain an action based upon such avoidance without showing that he had, prior to the commencement of the action, rescinded

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the contract, tendered back the consideration received under it, and placed the defendant in *statu quo;* and as he did not offer to do this, evidence to show fraud was inadmissible:—4 *Mich.* 508; 13 *Barb.* 641; 8 *Barb.* 9; 23 *Barb.* 656; 1 *Denio*, 69; 2 *Hill*, 288; 5 *Hill*, 398; 34 *N. H.* 556; 5 *Met.* 52; 41 *Me.* 565; 1 *Swan*, 72; 1 *Doug. Mich.* 330. *Case* might be maintained without any rescision or tender back of what was received. But the recovery then would be limited to the *real injury*—the difference between the amount paid plaintiff and the *actual value* of the land.

CHRISTIANCY J.:

The evidence offered by the plaintiff was improperly refused by the court. It appeared inferentially from the evidence which had already been given, that the defendant had accepted and recognized the power of attorney, and that he had, in effect, assumed to act as the agent of the plaintiff; and the plaintiff offered to show that he had fully and in fact recognized the agency, and induced the plaintiff to place confidence in him, as such. In that confidential relation he was bound to the utmost degree of good faith, and had no right, while professing to act in that capacity, to make himself the agent of other parties for the purchase of the lands he was authorized by the plaintiff to sell; nor to take any advantage of the confidence his position inspired, to obtain the title himself. Nor could he make a valid purchase from his principal, while that confidential relation existed, without fully and fairly disclosing to his principal all the propositions he had received, and all the facts and circumstances within his knowledge, in any way calculated to enable his principal to judge of the propriety of such sale.

By his agreement with Wilkins and others in London, which appears to have been read in evidence without objection, it clearly appears that the defendant violated his

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duty to the plaintiff, or that he would be compelled to prove recreant to them: he had undertaken to act in two inconsistent capacities. For, while recognizing and referring to the power of attorney, he assumes the position of a joint purchaser, to some extent, of the same lands, with the three London parties, and undertakes to act as their agent, in a manner wholly inconsistent with his duties to the plaintiff. *Prima facie*, this agreement is indicative of an intent to defraud the plaintiff, his principal. There was but one way in which it could be reconciled with good faith and honesty of purpose, and that was by laying the whole transaction, every fact and inducement connected with, or bearing upon it, fully and frankly before his principal; and if *he then* chose to ratify it, or to continue further to avail himself of the defendant's agency in the sale, the transaction would have been fair and honorable towards the plaintiff at least. Whether he did this or not, this court have no means of knowing except from the offer of the plaintiff to prove the contrary; and for the purpose of disposing of this case in this court, we are under the necessity of considering the evidence offered and rejected as true. The further evidence offered by the plaintiff and rejected by the court, would, if it had fully met the offer as made, have tended strongly to show, and would have authorized the court or a jury to find, substantially, that the defendant, on his return from London, in accordance with a previous understanding with his associates there, fraudulently concealed from the plaintiff all knowledge of the agreement in question, falsely representing to the plaintiff that he had sold the land to certain parties in London, not naming them, for only twenty-two thousand dollars, which he represented to be the highest sum he could obtain for them; of which he had received two thousand dollars down, which he was ready to pay over: and by the fraudulent concealment of all the real facts of the case, as well as by various false and fraudulent repre-

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sentations and pretences (particularly set forth in the bill of exceptions) induced the plaintiff to believe such sale had been made, and though the power of attorney had been exceeded, to consent to the sale thus fraudulently represented to have been made; and that the defendant, still professing to be acting as the agent and for the interest of the plaintiff, who still reposed confidence in him as such, induced the plaintiff to receive the two thousand dollars, as part of the supposed purchase price; and that by equally false and fraudulent representations, and, as he led the plaintiff to believe, for the purpose, and as a necessary or convenient means, of carrying into effect his agency in completing the sale to the London parties, he induced the plaintiff to execute to him a deed of the property, taking back a mortgage from the defendant without any personal liability on his part, for the supposed balance of twenty thousand dollars in six months; the defendant representing to the plaintiff that if this sum should not be paid by the purchasers within the time, he would reconvey to the plaintiff, and the two thousand dollars would be forfeited to him. In short, such evidence would have shown that the defendant purposely took advantage of the confidence which he knew the plaintiff reposed in him as his agent, and obtained the deed from him by a gross and deliberate fraud; a fraud not depending upon the subsequent non-performance of a parol promise, but an actually preconceived and deliberate intention to cheat and defraud the plaintiff, accompanying and forming part of the transaction itself.

The deed being thus obtained, the land in equity and good conscience, as between the plaintiff and the defendant, still belonged to the plaintiff; or, to express the same idea in the more formal and technical language of a court of equity, the effect of the transaction was to place these lands in the hands of the defendant, subject to a *trust* in favor of the plaintiff, *by operation of law;* such being

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the *legal effect* which a *court of equity* would give to the *whole transaction:*—See *Lloyd v. Spillet*, 2 *Atk.* 250; *Rutherford v. Ruff*, 4 *Desaus.* 350; 1 *Paige*, 147; 2 *Bouv. Inst.* 327.

This species of trust may always be proved by parol, notwithstanding the statute of frauds. If this could not be done, the statute, which was intended to *prevent* fraud, would itself become the most efficient *protection* to fraud ever contrived by human ingenuity:—See *Hill on Trustees*, 166; 1 *Hovenden on Frauds*, 471, *and cases cited; Jenkins v. Eldredge*, 3 *Story*, 181; *Cox v. Cox*, 5 *Rich. Eq. R.* 365.

But the plaintiff is not here seeking strictly to enforce a trust, and I refer to this doctrine of trusts only for the purpose of showing that the land in equity and good conscience still belonged to the plaintiff, after the execution of the deed; and if so, the money which the defendant afterwards received on the sale of it must also belong to him *ex equo et bono.*

But the plaintiff, to sustain his count for money had and received, and to show that money had come to the hands of the defendant which, of right, belonged to the plaintiff, further offered to show that the London parties, having failed to carry out their written agreement with the defendant, he, the defendant, in August, 1853, without the knowledge or consent of the plaintiff, actually sold these lands to one Henry Weld Fuller, subject to the mortgage from defendant to plaintiff, for the sum of fifteen thousand dollars in cash, which was paid to the defendant; the purchaser undertaking to pay off the plaintiff's mortgage of twenty thousand dollars; thus making the real purchase price thirty-five thousand dollars, of which, putting the transaction upon the ground of an agency on the part of the defendant, the plaintiff had received two thousand, and a mortgage for twenty thousand, leaving a balance due him of thirteen thousand dollars.

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This deed to Fuller being properly recorded, the plaintiff was, of course, precluded from disaffirming the sale and recovering the lands, or from enforcing a trust against the grantee, without proving actual notice to the purchaser of defendant's fraud in obtaining the deed. Such notice can not be presumed without proof, and, as there appears to have been no pretence of any such notice, Fuller, so far as the present case is concerned, must be considered a purchaser in good faith without notice.

As the plaintiff, therefore, could not avoid the sale by a bill in chancery, and as his only remedy there, upon the facts offered to be shown, must be confined to the purchase money, he brings his action for money had and received for the balance of the purchase money, thirteen thousand dollars, in the hands of the defendant; thus affirming the deed to Fuller, the defendant's agency in the sale, and his own deed to the defendant. But this no more affirms or admits that the money received for the property belongs to the defendant, than a plaintiff admits the same thing in the ordinary case of waiving a tort and suing for the proceeds of the property wrongfully sold.

The plaintiff, therefore, does not seek to show the fraud of the defendant for the purpose of avoiding any deed: and the cases cited from New York and some other states, to the effect that fraud of this kind can not be shown at law to avoid a deed — a doctrine which I think may well be doubted under our statute (*Comp. L.* §4327; see 2 *Pars. on Cont.* 280)—have no application to the present case.

The plaintiff does not sue upon any parol contract required by the statute to be in writing, nor upon any express contract whatever; but upon one which the law implies from the equities of the whole case; or rather, upon a duty on the part of the defendant, which the law recognizes as springing from the whole transaction. Nor is the action brought to recover back the consideration

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paid on a contract rescinded; and the plaintiff is no more bound to tender back what he had received upon his land, than the principal, in an ordinary action against his agent for money received in the course of his agency, would be bound to return to the agent the amount he had already received from him, before he could recover for the balance. The plaintiff sues for a part of the price of his land, fraudulently received by the defendant as his agent. Neither the provisions of the statute relied upon, nor any provision of the statute of frauds, any more conflict with such an action than if it had been brought for the price of goods wrongfully sold.

The statute relied upon, and which requires certain estates and interests in lands, and express trusts relating thereto, to be created or declared by deed, was fully complied with in the present case:—*Van Alstine v. Wimple*, 5 *Cow.* 162. This statute has no reference to an action brought for the price of land, nor does it in any way operate to exclude parol evidence in support of such action, which may still be maintained by such evidence, though the deed acknowledge the receipt of the consideration: it is in this respect but a receipt, and only *prima facie* proof of payment of the consideration:—1 *Phil. Ev. by Cowen, Hill & Edwards*, 477, *n.* 131, *and cases cited.* The legal effect of the deed as a conveyance, which is its real purpose, is not altered by parol proof in such cases; nor is it any more altered or affected by the like proof in the case before us.

We must consider this case, upon the evidence offered by the plaintiff, as falling substantially within the ordinary rules applicable to actions brought by a principal against his agent for money received by him on the sale of his principal's property. To hold otherwise would be to sanction the doctrine that an agent may, at any time, get rid of his obligations to his principal by his own fraud, and that he may set up this fraud in bar of his principal's right to the proceeds of his own property.

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But it is objected that the plaintiff's remedy is in equity, and that this is an attempt to convert the action of assumpsit into a bill in equity. We do not mean to say that the plaintiff could not have sustained a bill in equity upon the facts of this case. A court of equity might sustain such a bill for the purchase money, as founded upon the notion of a trust; and the plaintiff might be entitled to a discovery. In respect to the discovery, such a bill might, perhaps, in some cases of the kind, be a more advantageous remedy. But if, for want of such discovery, this action is less advantageous to the plaintiff, that can be no ground of complaint on the part of the defendant. The plaintiff may waive his right to discovery, and take upon himself the risk of being able to prove his case without it.

We understand the law to be well settled, that the action of assumpsit for money had and received is essentially an equitable action, founded upon all the equitable circumstances of the case between the parties; and if it appear, from the whole case, that the defendant has in his hands money which, according to the rules of equity and good conscience, belongs, or ought to be paid, to the plaintiff, he is entitled to recover. And that, as a general rule, where money has been received by a defendant under any state of facts which would, in a court of equity, entitle the plaintiff to a decree for the money, when that is the specific relief sought, the same state of facts will entitle him to recover the money in this action. We do not mean to say there are no exceptions to this rule, standing upon some rule of policy or strict law, in peculiar cases; such as money wrongfully recovered upon a judgment which remains unreversed (as in the case of *Moses v. Macpherlan*, 2 *Burr.* 1005), or where there is a special agreement still open and unperformed. But we are aware of no such exception applicable to a case like the present: nor can we discover any plausible reason why it is

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not just as competent to inquire into such a fraud, in a case like the present, in a court of law as in a court of equity. The view we have taken of the nature of this action for money had and received has, we think, been the well settled legal view of the action, at least since the case of *Scott v. Surman*, *Willes*, 404, 405, (in the year 1742) long previous to the case of *Moses v. Macpherlan*. The opinion of Lord Mansfield in the latter case, as to the general nature of the action, has not, that we are aware, ever been overruled by any respectable authority; though it has been overruled as applied to some of the facts of that case.

That such is still held to be the equitable nature of this action, might be shown by a very long list of authorities both in England and in this country; but we cite only the following as illustrating what may be considered an almost unbroken series of judicial decisions:—*Abbotts v. Barry*, 2 *B. & B.* 369; *Hill v. Perrott*, 3 *Taunt.* 274; *Kelley v. Solari*, 9 *M. & W.* 54; *Wiseman v. Lyman*, 7 *Mass*; 288, 289, (where the nature of the action is very fully explained) *Hess v. Fox*, 10 *Wend.* 436; *Eddy v. Smith*, 13 *Wend.* 488; *Mowatt v. Wright*, 1 *Wend.* 360 (which like *Hess v. Fox*, confirms *Moses v. Macpherlan* as to the equitable nature of the action); *Weeks v. Hunt*, 13 *Vt.* 144; *Scott v. Williamson*, 11 *Shep.* 343; *Beardslee v. Horton*, 3 *Mich.* 560.

That this action lies, and all these equitable considerations apply, as well where the money has been obtained by fraud as by other means, see *Litt v. Martindale*, 36 *E. L. & Eq.* 424, and *Abbotts v. Barry*, above cited: and even where money has been received, as here, by the fraudulent procurement of a deed, which is affirmed by the action:—*Bliss v. Thompson*, 4 *Mass.* 488; and see *Fenemore v. United States*, 3 *Dall.* 357.

And the same equitable considerations apply to any defense set up in this action:—*Eddy v. Smith*, *ut supra.*

In *Wright v. Butler*, 6 *Wend.* 284, it is expressly held

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that "actions of assumpsit on the money counts are resorted to as a substitute for bills in chancery, and are encouraged wherever the law affords no other remedy, and where a court of equity would compel a defendant to repay the plaintiff a sum of money which the latter had been compelled to pay for his benefit." Substantially the same view as to the count for money had and received was held in *Scott v. Surman*, *Willes*, 404, and by the Supreme Court of Massachusetts in *Peabody v. Tarbell*, 2 *Cush.* 226; and see *Gangwer v. Fry*, 17 *Pa. St. R.* 491.

We think all the evidence offered by the plaintiff was clearly admissible. The judgment of the Circuit Court must therefore be reversed, and a new trial granted.

MARTIN CH. J., and MANNING J., concurred.

CAMPBELL J., did not sit, having been counsel for one of the parties.

James Nall and another v. William L. Granger.

Where persons have in good faith acquired a lien upon property, prior to a levy upon it, there is no such privity between them and the execution debtor, at the time of the levy, as can in any respect make his rights the measure of theirs, as between them and a purchaser under the execution.

As between the purchaser at a sheriff's sale, and one who claims the goods as the mortgagee of the judgment debtor, the sheriff's return on the execution is not conclusive as to the time of the levy, but such mortgagee has a right to show that the levy was not made till after the time stated in the return, and after his right, as mortgagee, accrued.

Such evidence would show that there was no privity between the mortgagee and the judgment debtor, and that the sheriff had no right to make a return affecting the mortgagee or the property.

And where a purchaser, knowing of a mortgage on the property, colludes with the sheriff, and procures from him a false return of a levy before the giving of the mortgage, and purchases the property on condition that such false return shall be made; *Held*, in a suit between the mortgagee and the purchaser, that this fraudulent collusion may be shown, and any effect of the return on the rights of the mortgagee defeated on the ground of this fraud.

Heard July 7th. Decided July 9th.

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NALL v. GRANGER.

Error to Eaton Circuit.

Nall & Duncklee sued Granger, in replevin, for certain oxen and a horse, which they claimed under a chattel mortgage given by M. H. Crafts, September 1st, 1857. Defendant claimed the property as purchaser at a sale of the same, made November 23d, 1857, by the sheriff of Eaton county, by virtue of an execution against Crafts.

On the trial, after plaintiffs had proved their mortgage, defendant called George N. Potter, who testified that he was sheriff of Eaton county from January 1st to and including November 23d, 1857. He then produced the execution by virtue of which the sale in controversy was made, and read the following endorsements thereon:

"State of Michigan, County of Eaton, ss: By virtue and with the consent of Myron H. Crafts, I have, this 23d day of November, 1857, sold his interest in the goods and chattels levied upon by virtue of the within writ, for the sum of one hundred dollars.

GEO. N. POTTER, Sheriff."

"State of Michigan, County of Eaton, ss: By virtue of the within writ, I have, this 26th day of August, 1857, levied upon the following goods and chattels to wit: one horse, harness and buggy, two yoke of oxen, one two year old steer, one yearling steer, one yearling heifer, and eight sheep. GEO. N. POTTER, Sheriff."

On his cross-examination, said Potter testified that he could not tell exactly when he signed the levy; that he signed it after the time of the levy, but before advertising the property: that the levy was on the execution at the time of making the sale.

Plaintiffs' counsel then proposed the following question to the witness: Did you see the property at the time of making the levy, and if so, where was it? Which question was objected to by defendant on the ground that it tends to impeach the levy; and the objection was sustained by the court.

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After defendant had rested, plaintiffs called Crafts, who testified that before November 10th, 1857, the property in controversy had run at large in the woods. Plaintiffs' counsel then asked him the following question: Had you any knowledge of the levy before November 10th, 1857? This question being objected to, counsel stated their claim to be:

First: If in fact a levy was made on the 26th of August, and no notice given or possession taken of the property until the tenth day of November following, and in the meantime, without knowledge or collusion, the plaintiffs received from the witness the property, then the defendant could have acquired nothing by his purchase.

Second: Plaintiffs propose to show that no levy had in fact been made prior to November 10th, 1857; that the defendant knew this fact, and knew of this mortgage, and by collusion with the sheriff at the time of the sale, was to procure from the sheriff a return that he had made such a levy before the execution of the mortgage.

The court decided that the evidence offered was not admissible to contradict the return of the sheriff of the fact of his levy upon the property, and the time of making it.

The plaintiffs' counsel then asked the witness the following question: Have you had conversation with the defendant in relation to the subject matter of this controversy? If so, what did he state as to his knowledge of a levy upon the property? This question being objected to, the counsel stated that he proposed to show by this witness, and others whom he named, that the defendant had said, since the commencement of this suit, that he knew the sheriff had not made a levy upon the property purchased at the sheriff's sale, before the execution and delivery of the chattel mortgage to plaintiffs, but that the sheriff then agreed to endorse his levy on said execution as of a day prior to the execution of said mortgage, which was a condition upon which he purchased the property. The court sustained the objection, and ruled out the evidence.

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Judgment having passed for defendant in the court below, plaintiffs filed exceptions, and brought error.

Shaw & Bronson, for plaintiffs in error:

The statute does not require the sheriff to endorse the date of his levy; and the return, therefore, is not evidence of the time of the levy:—5 *Ired.* 198; 11 *Fost.* 16; 2 *N. H.* 391.

In order to constitute a valid levy on goods, they must be within view of the officer at the time, and subject to his immediate disposition and control; especially as against one who subsequently purchases them from the debtor without notice of the levy:—2 *Hill*, 266; 5 *Denio*, 198; 3 *Wend.* 445; 23 *Wend.* 490; 14 *Wend.* 124; *Watson on Sheriffs*, 172, 191; *Crocker on Sheriffs*, 28, 30.

The return of an officer, whether on mesne or final process, is prima facie evidence only, and liable to be disproved; and seldom conclusive as to third persons:—5 *Ired.* 198; 6 *Conn.* 334; 19 *Vt.* 80.

If the defendant knew of the fact of the plaintiffs' rights to the property, under the chattel mortgage, and was guilty of collusion with the officer, he could acquire no rights by his purchase:—4 *Blackf.* 230; 15 *Mass.* 230; 2 *N. H.* 81; 1 *N. H.* 68; 1 *Minn.* 434; 25 *Pa. St.* 413.

Blair & Gibson, for defendant in error:

A legal and sufficient return by an officer can not be contradicted, except in a suit against the officer himself: 17 *Mass.* 600, *and cases cited;* 8 *Greenl.* 272; *Ibid.* 211; 8 *Mass.* 334; 11 *Fost.* 99; 35 *N. H.* 421; *Ibid.* 9. It is not traversable, and the court will not permit it to be collaterally attacked, even if the officer is shown to have been guilty of fraud and collusion:—5 *Cal.* 53; 12 *Ohio*, 235; 3 *Lit.* 129, 132.

Even when a party has been guilty of some trick or device designed to get the property at less than its value,

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it will not be void unless it be shown that he actually succeeded in getting it for less than it would bring at a fair sale:—25 *Pa. St.* 413; 28 *Pa. St.* 433. The only way to remedy the collusion is to move the court to set aside the sale; it can not be attacked collaterally.

That the Legislature intended that the fraud of the officer should be no exception to the general rule, is seen in the severe penalty provided in that case:—*Comp. L.* § 4492. But the attempt here is to *get rid of the levy.* To allow this, would be a most dangerous practice. It is not pretended that there was any thing unfair in the sale. If it would have been valid as to any other bidder, why not as to Granger, the highest, even though there was collusion?

CHRISTIANCY J.:

Whether, as a general rule, the return of a sheriff upon an execution is conclusive upon the defendant in the execution, and those claiming by privity from him, or only prima facie evidence, and liable to be impeached for fraud of the sheriff, is a question not necessary to the decision of this case, and upon which, therefore, we express no opinion.

To place the plaintiffs in this case in privity with the execution debtor, within the meaning and spirit of the rule which would bind them to the same extent as he would be bound, they must have acquired their right to the property in question after the execution had become a lien upon the property: in other words, after a levy of the execution upon it, as the property of the execution debtor. If the plaintiffs' rights to the property had become vested in good faith prior to the levy, no such privity existed between them and the execution debtor at the time of the subsequent levy, as could, in any respect, make his rights the measure of theirs, as between them and a purchaser under the execution. Because, if

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the levy was made after the rights of the plaintiffs had in good faith attached to the property, the defendant in the execution, the mortgagor, was not himself bound or affected by the levy, and had no rights in the property to be affected by it: his rights in, and control over, the property had been transferred to, and vested in, the plaintiffs, at a time when he had a perfect right so to transfer it, and when no lien upon it existed under the execution; and none could thereafter be acquired as against the plaintiffs.

If no such privity existed between the plaintiffs and their mortgagor at the time the levy was made, the return could not affect the rights of the plaintiffs by reason of any effect it might be supposed to have upon the execution debtor; and whether such privity did or did not exist at the time of the levy, or afterwards, must depend entirely upon the question, whether the levy had in fact been made prior to the time when the plaintiffs' rights attached under the mortgage. To make the sheriff's return, therefore, conclusive evidence against these plaintiffs of the *time* when the levy was made, is to use the return first to establish conclusively the fact of such privity, without which the plaintiffs could not be affected by the return, and then, in consequence of the privity thus established, to bind the plaintiffs conclusively as to the date of the levy shown by the return. It is manifest that this is reasoning in a circle. The fact of such privity is made the premises for this conclusion, and the conclusion itself is the only proof of the premises. The whole process by which the conclusion is reached takes for granted — nay, assumes as conclusively established — the very fact to be proved, and without proof of which the result could not be reached. Thus, the execution gave no right to the sheriff to take any property of the plaintiffs, but only that of the execution debtor. To give the sheriff any right to make a return which could affect their pro-

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perty, or the rights of the plaintiffs, the execution must have been levied upon the property before the plaintiffs acquired it from the execution debtor. If the levy had not been previously made, the sheriff could have no authority to make any return which could affect their rights in it: and to make his return conclusive evidence of the very fact without which he had no power to make the return, or to state officially the fact, is a process which ends where it begins; by assuming conclusively, independent of the return, and yet as a prerequisite to it, the very fact sought to be proved by it, and without which it can have no validity.

The purpose of a sheriff's return to an execution is not to decide upon rights of property between the execution debtor and third persons. But the theory which would make the sheriff's return conclusive upon the plaintiffs in the present case, would give him the power to determine this question of property conclusively, and without appeal. It would even give him the power, by a stroke of the pen, to divest property rightfully vested in third persons, to transfer it to the execution debtor, and to satisfy his execution from it, without any trial of the right, and by an arbitrary process not subject to review.

The evidence offered by the plaintiffs, had it come up to the offer, would have shown such an abuse of power in the present case: it would have shown that no levy had in fact been made till long after the rights of the plaintiffs had accrued: that there was therefore no privity existing between the debtor and the plaintiffs, and that the sheriff had no authority to make a return affecting them or the property: that the return was purposely dated back to a period anterior to the plaintiffs' mortgage, for the very purpose of defrauding them by subjecting the property to the execution. The evidence was therefore, we think, clearly admissible.

But there is still another ground upon which the judg-

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ment should be reversed. The plaintiffs offered further to show that the defendant himself (who claimed the property by purchase at the sheriff's sale) knew that no levy had been made prior to the tenth of November; long after the mortgage to plaintiffs had been executed and filed: that he knew of the mortgage, and by collusion at the time of the sale, with the sheriff, was to procure from him a return that he had made such levy before the execution of the mortgage: that the defendant had admitted substantially these facts, and also admitted that the sheriff had agreed to endorse his levy on the execution as of a day prior to the execution of the mortgage, and that this was a condition upon which he purchased the property.

These facts, if proved, to say nothing of the fraudulent abuse of official power by the sheriff in falsifying the record of his official acts, would have shown that the defendant himself, with full knowledge of the plaintiffs' rights, had deliberately entered into an unlawful and corrupt combination for the purpose of obtaining the property from the plaintiffs by the grossest fraud and falsehood, and that he stood before the court in the attitude of a swindler, having no claim which did not spring from his own deliberate fraud, and asking the court to aid him in obtaining the reward of his iniquity, by giving effect to his own fraud against innocent parties. Courts of justice can not be made the instruments for carrying into effect such schemes of fraud. If parties, in a case like the present, are ever precluded from impeaching a sheriff's return on the ground of fraud, it is only to protect innocent parties whose rights depend upon his official acts; not to protect a fraudulent purchaser from the consequences of his own fraud. We think all the evidence offered by the plaintiffs in this case should have been admitted. The judgment must be reversed, and a new trial granted.

The other Justices concurred.

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William Hale v. Jacob Houghton.

The Board of Water Commissioners of Detroit do not exceed their powers in contracting themselves to furnish and put in water pipe on private property, in a case which they regard, in good faith, as a proper one for the exercise of their discretion in using means to prevent waste and ensure security.

So far as third persons are concerned, the superintendent and engineer is the proper medium of negociation with the Board. And if he exceed his authority, and make a contract which the Board repudiate, third persons are not to be injuriously affected thereby, or deprived of rights acquired in good faith by dealing with an agent upon whose authority they had a right to rely.

Where, therefore, the superintendent and engineer contracted in the name of the Board to put in water pipe upon private premises, and put the same in accordingly, and the Board refused to confirm the contract; *Held*, that such refusal did not take from the owner of the premises the right to the pipe, but amounted to an election on the part of the Board to look to the superintendent for payment, and the latter might sue and recover upon the contract in his own name.

Heard May 30th. Decided July 9th.

Error to Wayne Circuit, where Houghton recovered judgment against Hale in assumpsit, for the value of certain water pipe, and materials and labor expended in introducing the same into the Russell House, in Detroit.

From the bill of exceptions it appears that during the year 1857, Houghton was superintendent and engineer of the Board of Water Commissioners for the city of Detroit: that to carry out the objects and purposes contemplated by the act under which they were organized, said Board owned and possessed sundry iron water pipes and other materials, and had in their employ laborers engaged in laying down said pipes in the streets, alleys, and other public grounds of the city; and that subject to the said Board, said property and laborers were under the custody, supervision and control, of the plaintiff, as their superintendent and engineer: that during the summer of 1857, Hale was the owner of the Russell House, upon which he was then making extensive repairs, additions and improvements: that he applied to plaintiff, on behalf of said Commissioners, but at the expense of Hale, to furnish

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labor and materials for, and to superintend the work of laying down a main inlet pipe, to be connected in rear of said hotel with the large pipe which conducts the water supplied by said Board along a public alley in rear of said hotel, and to be laid down from thence into and through the basement for the general supply of said hotel; that the pipe required for this purpose was larger than was usually required for conducting upon private property the water supplied by the Board, and could not have been conveniently procured in Detroit, elsewhere than from the Board: that Houghton complied with his request, and with the laborers in the employ of and paid by said Board, among whom was one Moore, who was so employed by the year and paid an annual salary, and with materials which were the property of the Board, Houghton caused said work to be done: that when the job was completed, Houghton made out and presented to Hale an account of the same in the name of the Board, and demanded payment thereof, which was refused: that in all this matter Houghton assumed to act as the agent or officer of, and on behalf of, said Board, and Hale dealt with him in that capacity. The rule of the Board with respect to the duty and power of the superintendent and engineer was given in evidence, and proof made that the work was done and the materials furnished without the knowledge or assent of the Board, and that they had never since ratified or confirmed the doings of Houghton in the premises, but had refused so to do. On the other hand, evidence was adduced on the part of Hale, tending to prove, that at three different times prior to 1857 the materials of the Board had been used, and their laborers employed, in furnishing and laying down water pipes upon private property. It was shown that Houghton, since its creation, had control and superintendence of all work done by the Board or its employees, but there was no evidence to show by whom

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these particular jobs had been directed or supervised, or whether or not they were done with the knowledge or assent of the Board, other than that it appeared that in each case payment for the work had been made to the secretary of the Board, and this appeared in the monthly reports made by him to the Board of said works. Evidence was also adduced tending to show, that these were the only instances in which the materials and labor had been used and employed upon private property, and that in each case the pipe required had been of unusual size for service pipe; that in other cases the operations of the Board had been confined to streets, lanes, and public squares, and other public property.

The Circuit Judge charged the jury: that the Board had no power to make the contract mentioned in the testimony, and, therefore, could not authorize any agent to make it for them; and that if the plaintiff had made the contract as their agent, and in their name, he was entitled to maintain a suit upon the contract, and recover in his own name. And he refused the request of defendant's counsel to charge that the materials mentioned in the account sued for, being conceded to be the property of said Board, if the plaintiff had no authority to sell them he could not recover their value in this suit, without proof that he had in some way acquired title thereto: that in this case, his recovery would not bar the right of the Board to the property, or Hale's liability to them.

Wm. Gray, for plaintiff in error:

The Board had power to make the contract. And the proof was ample that they made it by a duly authorized agent.

But if not, the materials still belong to the Board. Hale has acquired no title, and has nothing to pay for:—*Story on Agency*, §§ 225, 226, 229. Even when the party contracting as agent is the real owner and principal, he will not

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generally be allowed to sue in his own name:—5 *M. & S.* 383, 388–9. And there is no case where a mere agent, who sold the property without authority, in the name of the real owner, has been permitted to recover:—15 *M. & W.* 359; 3 *E. L. & Eq.* 391.

G. Andrews, and *S. T. Douglass*, for defendant in error:

An agent may maintain an action for the value of goods of his principal sold by him, whenever, the agent having exceeded his authority, his principal repudiates the contract, or the agent has in any other way, by his disposition of the goods, rendered himself liable for their value to his principal:—*Smith Merc. Law*, 193; *Story on Agency*, §§ 393, 398; 3 *Rob. Pract.* 38; 2 *Cowp.* 805; 15 *M. & W.* 359; 3 *E. L. & Eq.* 391; 18 *E. L. & Eq.* 422; 5 *M. & S.* 383; 17 *Ala.* 115; 27 *Ala.* 215; 12 *East*, 225.

CAMPBELL J.:

It is claimed by the plaintiff in error, that he should not be held responsible to the defendant in error for the articles furnished, because, by reason of the want of power in the defendant in error, no title passed to the articles in question.

Upon a careful examination of the charter of the Detroit Water Commissioners, we think the Board had power to make such a contract as that made by Houghton in their name. In carrying out the duty of supplying water to the city of Detroit, it was not contemplated that the Board should enter into a general plumbing business; but a regard to the safety of their works requires that they should have some discretionary power, not only in supervising the connections made by others, but, when large quantities of water are likely to be used, in using means themselves to prevent waste and ensure security. And we see nothing in the charter to prevent such work as that done in the case before us, if regarded in good faith, by the proper authorities, as a proper case for the exercise of such discretion.

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And, so far as third persons are concerned, the superintendent and engineer is made by the regulations the proper medium of negotiation. The duties imposed upon the Board require constant attention, and it could never have been supposed that such a body, serving gratuitously, and appointed as business men and not as engineers, should devote their time daily to the details of such business. That work must fall upon agents, and the officer referred to is chosen to exercise a general supervision over the whole arrangements, subject, of course, to the control of the Board. And while, in the present case, he exceeded his instructions, and the Board had a right, which they exercised, to repudiate his acts, the effect of such repudiation could not injuriously affect third persons, or deprive them of rights obtained in good faith by dealing with an agent upon whose authority they had a right to rely. We do not think the Board can regard Mr. Hale as unlawfully in possession of the property in question, and the effect of their refusal to ratify Houghton's contract amounts, therefore, to an election to look to the latter for payment.

This being the case, Houghton became by this refusal fully empowered to sue in his own name for the labor and materials furnished. And although the charge, so far as concerned the authority of the Board, was erroneous, yet the error was not material, and ought not to cause a reversal of the judgment.

The judgment must be affirmed with costs.

The other Justices concurred.

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John Bt. Bomier v. Thomas Caldwell.*

In a contract for the conveyance of land, the time, place and mode of payment, are not considered matters of substance, unless by the express stipulations of the parties they are declared to be so, or unless from the special nature of the case, and the necessary intention and understanding between the parties, they must be deemed material. Therefore, where on a bill for the specific performance of a parol agreement for the purchase and conveyance of lands, the contract as proved varied in these particulars from that set out in the bill, but corresponded in other respects; *Held*, that the variance was not material.

Where the parties to an agreement have not expressly stipulated that performance at a particular time shall be an essential part of the agreement, and where from the nature and circumstances of the contract, and the situation of the parties, there would be no particular hardship upon the party against whom the execution of the contract is sought to be enforced,—the conduct of the party in default not being unfair, or his claim unconscientious—a Court of Equity, so far as performance at the time is concerned, will aid the party in default, and decree a specific execution of the agreement as the only adequate measure of equitable justice between the parties.

Where under a parol contract for the purchase and conveyance of lands, the vendor had caused the land to be surveyed, and received upwards of one half of the purchase price, and put the vendee in possession, and had permitted him to retain that possession for several years in reliance upon the contract, without taking any steps to put an end to it; *Held*, that these acts of the vendor constituted such a part performance as to take the case out of the operation of the Statute of Frauds, and entitle the vendee to a specific performance of the agreement.

In a bill for the specific performance of a parol contract for the conveyance of land, the general facts relied upon, showing a part performance as a ground for taking the case out of the Statute of Frauds, and for enforcing the agreement, must be specifically set forth. And where evidence had been taken in the case showing valuable improvements made by complainant on the land in controversy, but there was no allegation in the bill with respect to such improvements; *Held*, that such evidence could not be considered in the decision of the cause.

Decided March 6, 1841.

Appeal from the Court of Chancery.

F. Johnson, for defendant and appellant.

J. A. Van Dyke, for complainant and respondent.

FLETCHER CH. J.:

The appeal in this case is by the defendant, from a

* This case, and that of *Jackson* v. *Evans*, following, having never been before reported, and being frequently inquired after, it has been deemed desirable to give them a place in this volume. For the opinion of the Chancellor in this case, see *Har. Ch. R.* 67.

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decree of the Court of Chancery, by which the appellant was directed to convey to the respondent a certain lot of land in pursuance of a parol agreement.

The counsel for the defendant object to the decree:

1. Because the contract was within the Statute of Frauds, and therefore can not be enforced.

2. That the contract admitted by the answer and supported by the evidence, is materially variant in substance from that set out in the bill.

3. That there has not been such performance of the agreement on the part of the respondent as to take the case out of the operation of the statute: Because, *First*, payment of a part only of the purchase money has been made: *Second*, time was of the essence of the contract, and the respondent had been long in default in making payment, and this lapse of time deprives him of his right to claim specific performance: *Third*, the possession taken by the respondent was not under the agreement, and possession alone is not sufficient to take the case out of the statute: *Fourth*, the evidence of improvements made by the respondent should have been suppressed, and can not be considered as giving respondent any claim to a specific execution of the agreement, because not alleged in the bill.

The first objection obviously depends upon our decision upon the third.

The respondent filed his bill in February, 1838, setting forth that, in the year 1830, he and the appellant entered into a verbal agreement, by which the appellant agreed to sell him a certain lot of land in the county of Monroe, in this state, giving a particular description of the lot, being three arpents in front on Otter Creek, and twenty-five arpents in depth, for the sum of $150, $80 of which was to be paid in cattle on the taking possession of the lot by the respondent, and the balance in three years; but in case it would not be convenient for

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the respondent to pay the balance at the expiration of three years, then the appellant agreed to extend the time for such payment to four, five or six years, as might be most convenient for respondent; the balance to be paid in cattle or grain as might be most convenient for respondent, and that the appellant should execute a conveyance to respondent as soon as he obtained the legal title to said lot from Antoine Lasselle; and that the respondent assented to these terms, and agreed to make payments accordingly:

That in pursuance of such agreement the appellant caused the land to be surveyed, and put the respondent into possession, and respondent paid the eighty dollars in cattle as agreed:

That at about the time of taking possession, the appellant informed him that he had obtained the legal title to the land from Lasselle, and appointed a day on which he would make a conveyance: That he called on appellant on the day appointed, when appellant said he had forgotten the appointment: That he again called on appellant some time in the spring of 1831 for a conveyance, when appellant said he was busily engaged in settling the estate of one Lasselle, but that he would execute the same at a further day:

That from that time to the tenth of July, 1835, he frequently called on appellant for a conveyance of the land:

That on the day last mentioned he tendered to the appellant $94,50, being the balance of principal and interest due on said contract, and demanded a deed of conveyance of said land, and that the appellant refused to accept the money or make conveyance.

That from the time he was put in possession by the appellant he has remained in possession up to the time of filing his bill, and has paid all taxes and assessments on the land: And during that time he has always been

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ready and willing to perform his part of the agreement.

The appellant in his answer sets up the statute in bar, and denies having made any contract respecting the land with respondent in the year 1829, but admits that he made a contract with him in 1830, respecting the lot in question, which lot he admits to be correctly described, but says by that agreement respondent was to give him either two or three dollars an acre, and he thinks it was three. He admits that eighty dollars was to be paid in cattle at the time respondent took possession of the lot, but he denies that he agreed to give respondent three years for the payment of the balance, but says that respondent, after paying the eighty dollars on taking possession, agreed to let him have a yoke of oxen the next fall, and to pay the balance that should be then due in three years: That by the agreement, respondent was also to pay the taxes for three years on two other lots of land adjoining the one in question, owned by the appellant. He denies that he agreed to give a deed of the lot until the whole consideration had been paid, or that respondent ever called on him for a deed until the tenth of July, 1835. He admits that he caused the lot to be surveyed, and put the respondent in possession, and that he had continued in possession ever since, and that he had paid the taxes on that lot. He also admits the payment of the $80 in cattle after the time he gave the respondent possession. He alleges that respondent had not delivered the yoke of oxen, or paid the taxes on the adjoining lot of land. He also alleges that, by the contract made by him with the respondent, he was to give a bond for a deed on the delivery of the yoke of oxen the next fall, and to execute a conveyance when the balance should have been paid in full. He denies that he agreed to take the balance due after the delivery of the oxen in cattle or grain, or that he agreed to give a further time than three years for the payment of the balance if the

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respondent should not find it convenient to pay at that time. He admits that respondent called on him on the tenth of July, 1835, and offered to pay the balance then due, and demanded a deed for the land, and that he refused to accept the money or make the conveyance.

The objection by the appellant that the case is within the Statute of Frauds, is fatal unless there has been such part performance as will take the case out of the statute.

The next objection is, that there is a variance between the contract alleged in the bill, and the one shown in the proof.

The contract as stated in the answer varies from that stated in the bill, in these respects:

1. In the price, which the appellant in his answer states, according to his recollection, to have been $3 per acre, or $225 in all.

2. In the delivery of a yoke of oxen the next fall, as part of the balance due after paying the first eighty dollars, which the bill includes in the balance payable in three years.

3. In the time for giving the deed.

4. In the time for paying the balance, which the answer says was not extended beyond three years, the bill says four, five or six years, if not convenient for respondent to pay sooner.

5. In the payment of taxes on the two lots as stated in the answer.

6. In the payment of the balance in cattle or grain as stated in the bill and denied in the answer.

As to the variance respecting the price of the land, the extension of the time for paying the balance beyond three years, and the payment of the balance in cattle or grain, the testimony clearly supports the bill.

In respect to the other matters of variance, the delivery of the yoke of oxen the next fall, the time for giving the deed, and the payment of the taxes on the two lots of

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land belonging to the appellant, in which the bill is not supported by the testimony, I think they can not be regarded as substantial parts of the contract.

The testimony shows that respondent was to deliver the yoke of oxen the next fall or pay fifty dollars in lieu of them. So that it was at the option of the respondent to deliver the oxen or pay the money, and the appellant can therefore be made good by compensation. And the time for the payment of the $50, I do not consider a substantial part of the contract.

If the contract proved correspond with that described in the bill, it will be established and enforced, even if there be some variance between the *terms* described and those proved, unless the variance relate to matters of substance. In the case of *Harris v. Knickerbacker*, 5 *Wend.* 638, where the answer denied the specific contract stated in the bill, but admitted one somewhat different in *terms*, varying from the contract stated in the bill as to the time of payment of a part of the purchase money, and as to payment of interest on certain payments, it was held to be no substantial variance. A correspondence as to price, and the description of the property, are matters of substance; but the time, place and mode of payment, are not considered matters of substance, unless by the express stipulations of the parties they are declared to be so; or unless from the special nature of the case, and the necessary intention and understanding of the parties, they must be deemed material. The objection, therefore, on the ground of variance, is not sustained.

But the next and most material point made in this case, is whether there has been such a part performance of the contract on the part of the respondent as will take the case out of the statute, and entitle him to a specific performance of the agreement.

1. It is objected first, that a payment of a part of the purchase money does not take the case out of the statute.

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If this were the only act of part performance, it would be necessary to review the authorities, and establish a rule upon this point; but with the views I have taken of other points in this case, it is not necessary now to examine the question.

2. A second objection is that the time for payment of the balance of the consideration of the purchase, was of the essence of the contract, and that the respondent having been long in default in this respect, is not entitled to claim the extraordinary interposition of a court of equity to enforce the agreement.

Time may be made an essential condition of a contract in some cases, by the express stipulation of the parties; although Lord Thurlow is said to have intimated in *Gregson v. Riddle*, cited in 7 *Ves.* 268, that time could not be made of the essence of the contract, even by the positive stipulation of the parties. It has, however been well settled that, in some cases, the stipulation of the parties as to time may have such effect that a court of equity will not assist the party in default:—*Lloyd v. Collett*, 4 *Brown's R.* 469; 4 *Ves.* 587, *note*; 7 *Ves.* 265; 1 *Johns. Ch.* 371.

But where the parties do not particularly stipulate as to the effect which a default in the payment of the money at the time shall have upon the contract, the time is not considered an essential part of, or rather a condition of the contract, unless under peculiar circumstances, where from the nature of the transaction and the condition of the parties a just and full *compensation* could not be awarded.

Nor is the party in default in such cases ordinarily obliged to show, by way of excuse, a good cause for his default before he is entitled to a specific execution of the agreement. It is true Chancellor Kent seems to lay down a different rule in the case of *Benedict v. Lynch*, 1 *Johns Ch.* 370; where he says: "From the review I have taken of the cases, the general principle appears to be perfectly establish-

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ed, that time is a circumstance of decisive importance in these contracts; but it may be waived by the conduct of the parties; that it is incumbent on the plaintiff, calling for a specific performance, to show that he has used due dilligence; or, if not, that his negligence arose from some just cause, or has been acquiesced in." The rule laid down by the learned Chancellor would appear to cast the *onus probandi* upon the party seeking a specific performance, to show affirmatively that he had used due dilligence, or that he had a just cause for excuse, or that the other party had waived or acquiesced in the default.

It will be readily seen on a review of the cases in which the question has been raised, under what circumstances a party in default shall be entitled to the aid of a court of equity to compel the execution of a contract, that eminent men have taken different views as to the rules best adapted to secure the equitable rights of the parties before them, and to secure, prospectively, a fair, prompt and steady compliance with private contracts.

While some have been disposed to require in a court of equity the same strict compliance with such contracts as is required by the rules of the common law, and to mitigate the rigor of those rules in extreme cases only, others, considering how easily courts of equity can adapt their rules to the equitable circumstances of each class of cases, and almost every individual case, and while relieving against forfeiture or hardness arising from the inattention and neglect of a party in the performance of his engagements, can at the same time protect the other party by a reasonable and fair compensation, have been disposed to adopt more liberal rules, as equally protecting the equitable rights of litigant parties, and contributing to secure the permanent establishment of a more safe and just system of fairness and honesty.

It appears to me, however, that the rule upon this subject has been settled upon reasonable and just grounds, and entirely in accordance with the principles of equity. In

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Waters v. Travis, 9 *Johns.* 450, on appeal in the Court of Errors, Spencer J. says that "place and time are circumstances affecting only the performance of the engagement, and do not import, in a court of equity, conditions by which the parties are to be considered as contracting on the ground of a strict compliance, but are merely circumstances admitting of compensation," — citing *Powell on Cont.* 268.

The same general principle was recognized in 1 *Dessau. R.* 398, and by the Supreme Court of the United States in 6 *Wheaton* 528.

Sugden (*L. of Vend. and Pur.* 205) lays down this general proposition, applicable in equity as well as at law, that "where one party fails in performing the contract, the other, if he means to rescind it, should give a clear notice of his intention"—and refers to 6 *Madd.* 18.

In the case of *Reynolds v. Nelson*, cited by Sugden, where the purchaser deposited £25 with the vendor, and being in default on the payments, the vendor gave notice that if the purchaser did not perform on such a day, he should consider that the purchaser had abandoned the contract, and act accordingly. In a bill filed by the purchaser for the specific execution of the agreement, it was held by the vice Chancellor that as the vendor had not given notice that he intended to rescind the contract on his part, and had not returned the deposit, the complainant was entitled to have the agreement executed.

Lord Redesdale in *Davis v. Hone*, 2 *Sch. & Lef.* 347, considering the views and proceedings of courts of equity in respect to the rights of parties, where there has not been a strict compliance with the terms of contracts, remarks: "A court of equity frequently decrees specific performance where the action at law has been lost by the default of the very party seeking the specific performance, if it be, notwithstanding, conscientious that the agreement should be performed; as in cases where the terms of the agreement have not been strictly performed on the part

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of the person seeking specific performance, and to sustain an action at law performance must be averred according to the very terms of the contract. Nothing but specific execution of the contract, so far as it can be executed, will do justice in such a case." And again in *Lennon v. Napper*, 2 *Sch. & Lef.* 684, his Lordship said: "The courts in all cases of contracts for estates in land, have been in the habit of relieving where the party, from his own neglect, had suffered a lapse of time, and from that or other circumstances, could not maintain an action to recover damages at law. And even when nothing exists to prevent his suing at law, so many things are necessary to enable him to recover at law, that the formalities alone render it very inconvenient and hazardous so to proceed-nor could, in many cases, the legal remedy be adequate to the demands of justice. Courts of equity have therefore enforced contracts specifically where no action for damages could be maintained; for at law the party plaintiff must have strictly performed his part, and the inconvenience of insisting upon that in all cases, was sufficient to require the interference of courts of equity. They dispense with that which would make compliance with what the law requires oppressive; and in various cases of such contracts they are in the constant habit of relieving the man who has acted fairly, though negligently. Thus, in the case of an estate sold by auction, where there is a condition to forfeit the deposit if the purchase be not completed within a certain time, yet the court is in the constant habit of relieving against the lapse of time. And so in the case of mortgages, and in many instances, relief is given against mere lapse of time where time is not essential to the substance of the contract."

Mr. Justice Story (2 *Eq. Juris. p.* 83) says: "Where the terms of an agreement have not been strictly complied with, or are incapable of being strictly complied with, still, if there has not been gross negligence in the party, and it

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is conscientious that the agreement should be performed; and if compensation may be made for any injury occasioned by the non-compliance with the strict terms; in all such cases courts of equity will interfere, and decree a specific performance. For the doctrine of courts of equity is not forfeiture, but compensation; and nothing but such a decree will, in such cases, do entire justice between the parties." And again, p. 85, he adds: "One of the most frequent occasions on which courts of equity are asked to decree specific performance of contracts, is where the terms of the contract have not, in point of time, been strictly complied with. Time is not generally deemed in eqnity to be of the essence of the contract, unless the parties have expressly so treated it, or it necessarily follows from the nature and circumstances of the contract."

So in the late case of *Hipwell v. Knight*, 1 *Y. & Coll.* 401, Mr. Baron Alderson, says: "In the case of a mortgage, the court, looking at the real contract, which is a pledge of the estate for a debt, treats the *time*, mentioned in the mortgage deed, as only a formal part of it, and decrees accordingly; taking it to be clear that the general intention should override the words of the particular stipulation. So in the ordinary case of the purchase of an estate, and the fixing a day for the completion of a title, the court seems to have considered that, the general object being only the sale of the estate for a given sum, the particular day named is merely formal, and the stipulation means, in truth, that the purchase shall be completed within a reasonable time, regard being had to all the circumstances of the case, and the nature of the title to be made."

From an examination of these and many other authorities which might be cited upon the point, the general principle seems to be well established, that where the parties to the agreement have not expressly stipulated that performance at a particular time shall be an essential part of the agreement, and where, from the nature and circumstances of the con-

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tract, and situation of the parties, there would be no particular hardship upon the party against whom the execution of the contract is sought to be enforced, and the conduct of the party in default not being unfair, or his claim unconscientious, a court of equity, so far as non-performance at the time is concerned, will aid the party in default, and decree a specific execution of the agreement as the only adequate measure of equitable justice between the parties.

It is true, this rule requires of a court of equity the exercise of extensive and liberal discretionary powers, in order to determine the facts and circumstances in each case, upon which must necessarily depend the application or rejection of the rule; but the exercise of such powers by a court of equity is so far from being an objection, that it lays at the very foundation of all equity, and forms its most peculiar and excellent characteristic, as contradistinguished from the strict, precise and unyielding principles which govern in the courts of common law.

In the case before us the parties have not, by any stipulation, made the time of payment of the essence of the contract. Nor is there anything in the nature of the contract, or the general object of the parties in making it, nor any particular hardship on the part of the appellant showing that a just compensation can not be made, or any unfairness on the part of the respondent, which ought to deprive the latter of his right to a specific execution of the agreement, if by his acts of part performance the case be not within the operation of the statute.

As to the acts of part performance, the appellant in his answer admits, as stated in respondent's bill, that in pursuance of the agreement he surveyed the land and put the respondent in possession, shortly after the agreement was made, in 1829 or 1830, when he received the $80; that the respondent has been in possession ever since, and has paid the taxes; that in July, 1835, the respondent offered to pay him the balance of the purchase money then due, and demanded a conveyance.

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It does not appear that the appellant ever made any demand of payment, or that the possession of the land be given up, or that he ever gave any notice to the respondent of his intention to put an end to the contract, or that he ever expressed any dissatisfaction as to the non-payment, until a very short time before the respondent tendered the balance due, in July, 1835.

From all that appears in the case, the respondent, under the first payment of $80, took and retained the possession, upon the fullest confidence that the agreement would be executed by the appellant; and his conduct has been fair throughout.

The possession so given to and held by the respondent, in full reliance upon the agreement, and in the absence of anything tending to show that the appellant had ever taken any steps to put an end to such contract, or even expressed any dissatisfaction at the default of the respondent with respect to the payments, and especially when the evidence shows that the appellant agreed to give a further time for the payment of the balance if the convenience of the respondent should require it, constitutes such a part performance of the agreement on the part of the respondent, under the most rigid rule ever applied by a court of equity, as must be sufficient to take the case out of the operation of the statute, and entitle respondent to a specific execution of the agreement.

There is evidence in the case showing that the respondent, during the time he has been in possession of the land, has made permanent and valuable improvements, building, and clearing twenty or thirty acres, and setting out fruit trees, valued at $200 to $500. It is objected, however, that this ought not to be considered, inasmuch as it is not alleged in the bill. The general facts relied upon, showing a part performance as a ground for taking the case out of the statute, and for enforcing the execution of the agreement, are required to be alleged in complainants bill; and

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therefore in this case, the fact of the improvements by the respondent is not taken into account in the decision of the case.

An objection was made by counsel for the appellant that the possession of the land was not taken by the respondent under and by virtue of the agreement set forth in his bill. But this objection must have been founded upon the alleged variance between the contract stated in the bill, and that admitted by the answer and proved by the testimony. The view I have taken of the objection as to variance, is an answer to this objection.

I am therefore of the opinion that the decree of the Court of Chancery in this case must be affirmed. That it be so modified that the respondent shall pay or tender the balance due to the appellant on or before the fifteenth day of July next, if he shall elect so to do, and that the appellant make conveyance within one calendar month from the time the said balance shall be paid or tendered to him; and that the respondent recover his costs of this court, to be taxed in the Court of Chancery; and that if the respondent shall not so elect to pay or tender the balance by the time so fixed, that then his bill be dismissed with costs; and that the record be remitted to the Court of Chancery with directions accordingly.

Decree accordingly.

Charles Jackson v. Joseph Evans.*

A party's own entries on his books of account can not be admitted as evidence in his behalf, unless a foundation be first laid by proving that he had no clerk, that some of the articles charged have been delivered, that the books produced are the account books of the party, containing original entries; and by further proof by those who have dealt and settled accounts with him, that he keeps fair and honest accounts.

* See note, page 468.

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JACKSON v. EVANS.

The servant of a man dealing in brick, who keeps a tally book or slate upon which he makes memoranda of sales during the day, reporting them to his employer at night, who enters the amounts upon his regular account books, is not a *clerk* within the meaning of this rule, and such regular account books are to be considered the books of original entries.

Where in charging the brick there was entered opposite each charge of a load the name of the teamster who hauled it, these teamsters should all be called to verify the charges, or their absence accounted for, before the books are received in evidence.

It is not competent, in order to dispense with the necessity of calling the teamsters, to prove by others that if called it would not be possible for them to testify from recollection to the quantity hauled. The main fact to be established is that the articles have been delivered; and it is only on failure to prove the delivery, or the quantity, by the teamsters when called, that the books are received as the next best evidence.

The account books kept by a party are evidence of so slight a character that no extension of the rule which admits them, beyond the apparent necessity of the case, should be allowed. Both the servant who delivered and the teamsters who hauled the brick, in such a case, should be called, to testify to their recollection, and the books are only received as evidence upon the presumption that no proof exists which has not been adduced.

The witnesses to prove that the party keeps honest books, should be able to identify the books, and to testify to settlements made from the entries on such books. It is not sufficient that they testify to having made settlements with the party, from bills presented, which they found honest, without being able to testify whether such bills were from the account books or not.

Decided in 1857.

Error to Wayne Circuit, where Evans brought assumpsit on the common counts, to recover of Jackson, and Jeremiah Moores, the value of certain brick. Moores died pending the suit.

On the trial the plaintiff called as a witness Theodore Evans, who testified that plaintiff was a brick-layer: that the book produced by witness was plaintiff's book of account in which he charged brick delivered by him, and from which he made out his bills. The witness looked at several pages in the book, and said the charges therein of brick delivered to Jackson and Moores were in plaintiff's hand writing: that he, the witness, delivera few loads of brick in the fall of 1853, to the defendants, but he could not tell how many loads he delivered, or what quantity of brick. On cross examination he stated that he was in the plaintiff's employ, and that it was part of his business to tally the brick as they were put into the wagons to be hauled by the several team

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sters of the plaintiff to the defendants: that he tallied most of the brick that were charged to the defendants, and what he did not tally he counted, and reported to the plaintiff all that were delivered to the defendants; that he told the men how many to draw, and where to draw them: does not know they did as directed, but knows some of them did: once in a while would coun a load, and then load the others in the same way, and estimate them as the same amount: the brick were sewer brick: those that were counted were piled in promiscuously: so were those not counted; most of the wagons held the same number. On re-examination he stated that they counted nearly every day: witness kept the number on a tally book or slate which he did not preserve: at night he reported to the plaintiff the number delivered during the day, and plaintiff entered the number thus reported in the account book of the plaintiff.

O. B. Smith testified that he was a brick-layer: had had accounts with the plaintiff and settled with him on bills which he produced, and never saw the account book now produced: found the bills presented by the plaintiff correct.

Joseph Granger testified that he was a mason: had dealt with Mr. Evans several thousand dollars worth: had settled with him on bills produced by him, and found the amounts correct: found him to keep correct accounts.

Warren Reed testified that he worked for plaintiff in 1853 hauling brick from his yard to defendants, on the lines of sewers which they were building in Detroit: hauled rom June or July to September or October. A small pass book was produced by the plaintiff, which the witness testifies he got at Jackson's request: the writing in it with ink is the hand-writing of Evans; that in pencil of Jackson: witness cannot state from his own recollection how many brick he delivered: Jackson in making the entries

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had to take the statement of witness as to how many there were in each load.

Theron Evans testified that he knew the plaintiff delivered sewer brick to the defendants in 1853, from July to October or November: witness had a pass book (which he produced) in which defendants put down part of the brick delivered: witness cannot tell or guess what number of brick he delivered: for the number entered in the pass-book the defendants had to take his word.

Another small pass-book was here produced by the plaintiff, making three in all, in which defendant Jackson made entries of the number delivered, as reported to him by the teamster. These pass-books contained entries of only a small part of the brick for which pay was claimed by the plaintiff in this suit.

The plaintiff thereupon, without further testimony, offered to read the said account book to the jury, for the purpose of proving the number of brick delivered. On inspection of the book, it appeared to be kept in leger form, and contained several pages of charges of brick delivered to defendants in the summer and fall of 1853, which were scattered through the book with accounts against other persons, a page being generally devoted to each person's account. Many pages were filled up with charges, and many were not. The charges against the defendants were for loads of brick, each charge being for one, two, three or four loads, as the case might be. Against each charge, was the name of the teamster by whom the bricks were hauled and delivered. Several of these teamsters were not called, nor their absence accounted for, by the plaintiff.

The defendant objected to the book being read in evidence, for the following reasons:

1. The persons whose names appear opposite the charges have not been called.

2. The memoranda kept by Theodore Evans have not been produced or sufficiently accounted for.

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3. There is no evidence that the brick tallied and counted by Theodore Evans were actually delivered.

4. The necessary preliminary proofs have not been introduced.

5. The book is not competent evidence under any circumstances.

6. The plaintiff having the right to call the defendant, must do so, or account for his absence before he can resort to the account book, which at best is but secondary evidence.

On these objections being stated, the plaintiff offered the following additional testimony, which was received under objection:

Joseph Granger testified that he should think it would not be possible for a teamster, hauling three or four loads of brick a day, to testify from recollection what quantity of brick he delivered.

Warren Reed testified that he was an old teamster, and had a pretty good memory; and that it would be impossible for him, hauling three or four loads of brick a day, to testify from recollection what quantity of brick he delivered.

The plaintiff then again offered said account book in evidence, and the court admitted the same — the defendant still objecting—and the jury rendered a verdict for plaintiff for the value of the brick charged for therein.

L. Bishop, for plaintiff in error.

Emmons & Jones, for defendant in error.

WING J.:

One of the errors alleged is, that the defendant's account book in which the entries were made by himself, were received in evidence. It is objected that the admission of this evidence is not authorized by the common law, nor by the statutes of this state.

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This species of evidence is received in almost every court of the United States, under what Mr. Greenleaf calls the American rule. It is said the principles of the rule were introduced into this country from Holland, by the first settlers of New England, and that the rule itself is supposed to be founded upon a kind of moral necessity. It now forms a part of what may be called the American common law.

From the earliest settlement of this state, we have recognized the New York rule as expounded and established in *Vosburgh v. Thayer*, 12 *Johns.* 461. And now after it has existed with us, as a rule of evidence, upwards of thirty years, we do not feel competent to discard it, and return to the common law rule, even if a change was desirable. With the expediency of the rule we have nothing to do: we take it as we find it, and have no apologies to make for it.

According to this rule, the books of account of the party can not be admitted, unless a foundation is first laid by proving that the party had no clerk, that some of the articles charged have been delivered, that the books produced are the account books of the party; and he must prove by those who have dealt and settled accounts with him, that he keeps fair and honest accounts.

The witness, Theodore Evans, testified that the books produced were the account books of the defendant. It is not directly proved that the defendant kept no clerk; but the nature of the business and the mode in which it was conducted, as described by the witness, establishes the fact that he kept no clerk. The witness says it was his business to tally the brick when hauled away by the teams; that he counted and tallied all the brick that were loaded, and kept an account of them on a tally book or slate (which he did not preserve), and on the evening of the same day (usually) or the next day, he reported the number to the defendant, who entered it in his ac-

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count book. This witness made no entries or charges in the books. We think this case is brought within the scope of the decision in the case of *Sickles v. Mather*, 20 *Wend.* 72. In that case the witness testified that he had long been in the employment of the plaintiff as foreman in his factory, and had delivered all the brick the plaintiff had sold, and made memoranda of his sales on a slate which he kept at the factory during the day, from which plaintiff made entries in his book in the evening or the next day. The court held that the foreman was not in any sense a clerk for the purpose of verifying the books. A clerk could connect them with the sales, and his original entries (to the general accuracy of which he could make oath) became themselves evidence of what he may have forgotten.

It is further objected that the tally book and slate kept by Theodore Evans were not produced: that the evidence shows Theodore Evans kept a tally-book, and this should have been produced. But we think there is nothing in this objection. No inference can be reasonably drawn from the evidence of this witness that the tally book is in the possession of either the witness or defendant, or that it was preserved. The witness says he kept his memoranda on a tally-book or slate, which he did not preserve; they are both classed together as if alike destroyed.

The objection also assumes that the entries in the books produced were not the original entries. It is claimed that the memoranda on the tally-book or slate kept by Theodore Evans, were the original entries, so far as they extended. But these temporary memoranda were made preparatory to permanent evidence: they are not regarded as original entries. Charges made in books, as these were, in the regular course of business, at or near the time of the transaction, are considered to be original entries: *Sickles v. Mather*, 20 *Wend.* 72; 1 *Smith's Lead. Cas.* 232,

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235; 1 *Greenl. Ev.* § 117, *note*; 12 *Pick.* 139; 13 *Mass.* 427; *Cow. & Hill's Notes*, 682; *Kelley's R.* 232.

It is alleged as error that the evidence of Granger and Reed was received. The bill of exceptions shows, that in charging the brick the names of the teamsters who hauled them were set opposite the charges. Only a part of the teamsters were called by defendant as witnesses, and it was objected the books should not be received in evidence until all who delivered brick were sworn, or their absence accounted for.

It was assumed that, if called, they could not remember the number of brick delivered by them respectively, and to establish this fact, or make it probable, witnesses were called, and testified in substance, that it would not be possible for a teamster, hauling three or four loads of brick a day, to testify from recollection what quantity of brick he delivered. To this ruling of the court admitting this evidence, and also admitting the books in evidence without calling the other teamsters, who delivered a large portion of the brick, plaintiff in error excepted.

The evidence of Granger and Reed, as given, was improperly received. They were not called as experts, and if they were they could not be received to give evidence as experts on such a subject: — 1 *Greenl. Ev.* § 440. Upon the other point we have found but two cases which sustain the ruling of the court: — In *Curren v. Crawford*, 4 *S. & R.* 6, the plaintiff owned a lime kiln, and had sold lime to the defendant; he produced his account books in evidence, in which the charges were made by himself, and in part from memoranda furnished to him by his teamster; he testified he was present when some of the wagons were loaded with lime for defendant, but he was not always present when the wagons were loaded; the lime he did not see loaded he generally saw delivered. It was objected that the teamster was the best evidence of the delivery of the lime. The court held that it was not necessary to fortify

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the books by the oath of the teamster, and the books were admitted. In *Jones v. Long*, 3 *Watts*, 326, the plaintiff offered his books in evidence, and stated on his *voir dire* that he dug coal for the defendant, which was hauled by the servant of the defendant, who rendered to him an account every day of the loads hauled, which were entered by him in his book. It was objected as in this case, that the teamster should be called, as the best evidence. But the court held it was not necessary. They say "the books were not evidence *per se:* all that can be said is, that the weight of evidence furnished may be diminished before the jury by the non-production of the wagoner. It is not probable that the wagoner, after a lapse of time, would have thrown any light upon the quantity transferred daily: the same objection was made and overruled in *Curren v. Crawford*." The same court in *Koughley v. Brewer*, 16 *S. & R.*, in remarking upon the case of *Curren v. Crawford*, say "It has long been settled to receive books of original entries: in that case the court went one step farther, and received entries of lime sent from a kiln, and these entries must have been made several hours before the lime was delivered, and without any absolute certainty that the lime would be delivered; but it was necessary to receive such evidence or impose difficulties on the business which would be great to the seller, and materially increase the price to the buyer."

These are the only cases we have found in which the delivery of the property was made by an agent, and entered by the principal, and the books were received in evidence without calling the agent as a witness. They are in conflict with *Kessler v. McConachy*, 1 *Rawle*, 441; *Smith v. Lane*, 12 *S. & R.* 80, and many other decisions in the same state collected in *Cowen & Hill's Notes*, 694. The courts of other states appear not to have allowed so great a latitude in evidence.

In *Ingraham v. Bockius*, 9 *S. & R.* 285; *Koughley v. Brewer*, 16 *S. & R.*; *Kessler v. McConachy*, 1 *Rawle* 441; *Mer-*

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ris v. Bridge, 3 *Cush.* 343; *Smith v. Sanford*, 12 *Pick.* 139; *Faxon v. Hollis*, 13 *Mass.* 427; *Smith v. Lane*, 12 *S. & R.* 80, and *Sickles v. Mather*, 20 *Wend.* 72, the goods were delivered by foremen or servants, and entries were made in the books of the principal from their memoranda, but the agents or servants were called to prove the delivery, and it would seem that upon principle this should be required. The common law regards the entries of parties in their own books as less than secondary evidence; as hearsay evidence of their own fabrication; and they are not regarded by our courts as primary evidence. They are not received as satisfactory proof of charges, but only as proof of things which, from their nature, are not susceptible of higher proof. There is no warrant for this court to go beyond the necessity upon which the practice is founded. The books are introduced for the purpose of proving the delivery of the articles, or the service performed. In the states (except Pennsylvania) where the suppletory oath of the party is received, he must swear that the articles were delivered by himself, or that he knew of their delivery, and that he made the entries. It is obvious that where he can not do this, he can not give evidence in support of his books, and consequently they can not be received; and in our state, where the party is not permitted to swear to his charges, where it is apparent that the delivery of the articles was not made by himself, but by a third person, he should be called to prove it, or the result should be the same, unless it is made to appear that his testimony can not be had. The fact that it may be highly improbable that the person who may have delivered the property would remember the quantity, would furnish no sufficient reason why he should not be called. The main fact to be ascertained or proved, is, that the articles have been delivered. It is only upon failure to prove the delivery of the articles by the agent when called, that the books are received, as the next best evidence. This was apparently the only rea-

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son for the admission of the books in the cases last cited. The witnesses in those cases proved the delivery of the articles charged, but could not prove the quantity or number, and therefore the books were received. If the witnesses could have proved both the delivery and the quantity or number of the articles, there could have been no good reason for the reception of the books.

In this case we can indulge in no presumption which can dispense with the teamsters, or some one acquainted with the same facts, as witnesses. They were engaged in delivering brick to the plaintiff four or five months; the defendant knows their names, for he has them on his books; and if they could not remember how many they delivered, they can not but remember that they delivered to the plaintiff all the brick that were loaded and counted for that purpose, and which were tallied by Evans. This would be a very important link in the chain of circumstances, to prove a sale and delivery of the articles charged. The teamsters can prove the delivery. Evans proves the number loaded and hauled away, and that he reported them to the defendant, who entered them in his books: this makes up the *res gestæ*. To dispense with this evidence would be to set at naught a very valuable rule of the common law. This class of evidence is so slight at best, that no extension of the rule beyond the apparent necessity of the case should be allowed. Judge Harris in remarking upon this class of evidence in *Laraway v. Rowland*, 7 *Barb.* 107, says "the account books of a party are received in evidence only upon the presumption that no other proof exists. They are regarded as the weakest and most suspicious kind of evidence, and that too of the lowest grade, and should always be received with extreme caution." In speaking of the suppletory oath which is required of the party in some of the states, he says he concurs with Judge Cowen in believing that, frail as such proof must be, the law can hardly be censured for think-

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ing it would be but little fortified by the suppletory oath of an interested and excited party."

It is alleged that the books of account of the defend ant were received in evidence without his proving that he kept honest and fair accounts. The witnesses to this point were O. B. Smith and Joseph Granger. They both swear they had accounts with the defendant, and had settled with him on bills produced. The first says he never saw the books produced in court, but he found the bills presented correct. The latter witness says he "found the amounts of the bills correct—found him to keep correct books." It is obvious witness had no other knowledge on this point besides what he gained from the bills. We have examined the reports of New York and New Jersey (where our rule prevails) with a view to ascertain the course of decisions upon this point.

It is very evident, we think, from the cases in the New York reports, that the practice in that state has been to require proof of settlements by the books of the party, and that he keeps honest and fair accounts. We can not find any case in which this has been directly decided, but in nearly all of the cases in which this kind of evidence was received, it appears to have been proved that the witness knew the parties books, and had settled by them. This appeared in the leading case of *Vosburgh v. Thayer*. It was proved in *Linnell v. Foot*, 11 *Wend.* 569, that the witnesses "had dealt with the plaintiff, and that he kept fair and honest books." In *Sickles v. Mather*, 20 *Wend.* 72, the witnesses "had dealt extensively with the plaintiff, and had settled accounts with him, which they always found to be correct, and that he kept honest and fair books." In *Larue v. Rowland*, 7 *Barb.* 107, the witnesses testify that they "had dealt with the plaintiff, and settled with him from his books, and found their accounts upon his books all right." In *Beattie v. Qua*, 15 *Barb.* 133, the witnesses had "dealt with the plaintiff, and had settled with him; and they swore he kept honest books of

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account." In *McAllister v. Reab*, 4 *Wend.* 483, the clerk of the plaintiff testified that he had been present at several settlements, with different persons, and never heard any complaint of the correctness of plaintiffs books. These are all the cases we have found in which the evidence is stated. The great uniformity that is shown to exist in all of them upon this subject, shows clearly, we think, the understanding of the profession in that state to be that settlements by the books are to be proved, for the purpose of giving character to the books, and identifying them, instead of directing the proof to the character of the party whose books they are. The character of the party for integrity and fairness is not in question except so far as his books are concerned, and as it is the object to ascertain the general fairness and correctness of the books which are offered, it would seem that the proof should be connected with and point to them.

We have found a case reported in *Kelley*, 232, in which a lumber account was kept on a sheet or a part of a sheet of paper, which was appended to the writ, and which the plaintiff swore were his original entries kept by himself: they were received in evidence as such — proof being introduced showing the plaintiff was in the habit of keeping correct accounts. Witnesses were called, who proved that they had settled with him on presentation of their accounts, and they found them to be correct. In this case, the entries were made in part from memoranda on slates reported to the plaintiff. The witnesses settled by the plaintiff's bills. If any inference can be drawn from the case as to the character of the bills presented, it is, that these bills, as well as that attached to the writ, were the original entries also on sheets. The party had no books, otherwise the sheet attached to the writ would not have been admitted. We can not perceive how the evidence received in this case tends to establish the honesty or fairness of the books. It was not shown that the bills were transcribed from the books

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in question. Theodore Evans swore that the books were defendant's books of account in which he charged brick delivered by him, and from which he made out his bills. If it can be claimed that this clearly conveys the idea that the witness knew defendant made out his bills from this book, it does not show that the bills which were settled by the witnesses were transcribed from them, or from any book or account kept by defendant; for it was not shown that these books contained any accounts against those witnesses, and therefore we can not perceive how the evidence tended to support the books, or to lay a foundation for their reception by the court.

In addition to these views, we state our conviction that it has been the practice in this state for very many years, and as long as books of account have been received in evidence, to require evidence of the correctness and fairness of the books offered, founded on information gained by an actual inspection of and settlement by them. We see no good cause (if we have the power) to change a practice which is so well settled, and has prevailed so long amongst us.

Judgment reversed.

Present and concurring PRATT P. J., GREEN, JOHNSON, MARTIN, COPELAND and BACON JJ. DOUGLASS J. did not participate, having decided the cause in the court below.

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OCTOBER TERM, 1860, AT DETROIT.

The Washington County Bank v. Timothy Jerome.

A promissory note dated July 20, was by its terms payable "One year, August 15th, after date." *Held*, that it was payable not one year after its date, but one year from the fifteenth day of August after its date.

Heard October 6th. Decided October 11th.

Error to Wayne Circuit.

The action was brought in the court below against defendant as endorser of a note of which the following is a copy:

"DETROIT, July 20th, 1855.

One year, August 15th, after date, we promise to pay to the order of H. N. Walker, two thousand five hundred dollars, at Michigan Insurance Bank, value received, with interest. V. A. RIPLEY & Co."

The Circuit Judge charged the jury that this note was conflicting and repugnant in its terms, as to the time it became due; that the terms, "one year, August 15th, after date," could not be made to harmonize, and that in construing the note to determine when it became due, the words and figures, "August 15th," must be rejected as without effect, so that the note fell due in one year from July 20th, 1855.

If this view of the court was correct, it was conceded that defendant had not been properly charged as endorser.

Buel & Trowbridge, for plaintiffs in error.

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T. Romeyn, and *G. V. N. Lothrop*, for defendant in error.

CHRISTIANCY J.:

The only question in this case is, when did the note become due? Was it a year from the date of the note, or a year from the fifteenth of August following?

The first construction renders the phrase "August 15th," repugnant to all the other words of the instrument relating to the time of payment, and requires us to presume that the phrase in question was inserted by mistake, or with the intention of rendering the instrument nonsensical or repugnant, or without any purpose whatever. Prima facie, at least, all the words of an instrument must be presumed to have been inserted for some purpose; and it is little short of absurdity to attribute to the parties an absurd intention, when a reasonable and intelligible one can be extracted from the language of the whole instrument.

The second construction, which makes the note payable a year from the fifteenth of August following, gives full effect to the phrase in question, and to all the other words of the instrument, avoids all incongruity, and, while it attributes to no word or phrase a meaning not sanctioned by the common usage of the language, makes the entire instrument sensible and consistent. We can therefore have no doubt that the latter is the true construction, and expresses the real intention of the parties.

The note should be read as if written "on the fifteenth day of August, one year after date;" or "one year from the fifteenth of August, after date;" either of which is equivalent to "one year from the fifteenth of August next."

But it is said, the office of interpretation or construction is to ascertain the intention of the parties from the words which they have used; and that we are not at liberty to insert words which they have omitted, and which are not to be found in the instrument.

This rule is correct when taken with its proper limita-

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tions. But it must be understood with this qualification, at least, that words the omission of which by way of ellipsis, is sanctioned by usage, for the sake of brevity, and which are necessarily understood in order to give an intelligible meaning to the words used, or to complete the grammatical construction, must often be supplied, or, what is equivalent, understood as included in the words used.

Such grammatical ellipses are of frequent occurrence in all written instruments, and are common to all languages, whether written or spoken; but no where, perhaps, more common than in mercantile instruments, because brevity is no where more essential. Thus, drafts are made payable "at thirty days date," or "at ten days sight." No one ever doubted that, in legal, as well as grammatical construction, a preposition is to be supplied or understood before the words "date" or "sight;" and this is all that is required in the case before us.

Without this qualification of the rule which confines us to the words of the instrument, it may well be doubted whether any commercial contract could ever be sustained. No rule of construction requires us to abjure common-sense, by refusing to understand words clearly indicated by the context.

Phrases similar to that here in question, are in common use, not only by the illiterate, but by some who aspire to correctness and even elegance of language. Thus, we frequently hear the phrase "on Saturday week," or "a year the first of August," or "the first of August a year;" and when used in reference to a future event, no one ever doubted that these expressions were equivalent to "a week from next Saturday," or "a year from the first of August next." Words and phrases have no inherent meaning, but acquire their signification from usage alone.

The Circuit Court erred in rejecting the phrase in

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question as repugnant. The judgment must be reversed, and a new trial granted.

The other Justices concurred.

Luther G. Smith v. Edmund Canfield and another.

Partners must sue in their individual names. A writ of replevin issued on behalf of partners in the name of their firm is a nullity.

Submitted on brief October 9th. Decided October 18th.

Error to Manistee Circuit.

Pond & Russell, for plaintiff in error.

There was no appearance for defendants in error.

MANNING J.:

The writ of replevin is in the name of E. & J. Canfield, plaintiff. In the affidavit annexed to the writ, John Canfield is described as the plaintiff, and the declaration is in the name of Edmund Canfield and John Canfield. Defendant made a motion to quash the writ and subsequent proceedings, but did not enter his appearance in the cause, or further appear therein after the motion was denied. The writ of replevin was a nullity, as no person was named in it as plaintiff. E. & J. Canfield, the proceedings show, was the name of a partnership. Partners can not sue in the name of the firm.

The judgment is reversed with costs.

The other Justices concurred.

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John Hotchin and others v. Joseph K. Secor and another.

A note received for a prior demand is payment of that demand if such is the understanding and assent of the parties.

That such was the understanding and assent of the parties may be proved by their subsequent acts and conduct, as well as by direct proof of an express agreement.

Where the note of two members of an association was taken for the amount of a debt against the association, and this note was afterwards paid in part by the makers, and their notes on longer time taken for the balance; and suit being brought on the original debt, the court was asked to charge the jury "that it was not absolutely necessary to show an express agreement on the part of plaintiffs to receive the note in payment of the claim against the association; but that if the jury find, from all the circumstances of the case, and the subsequent acts of the plaintiffs in regard to said note, and in taking new notes of the makers, and extending the time of payment, they had acted and treated said notes as their own, and as received in payment of their claim, then the jury are authorized to take such facts into consideration, and find that the note was received by the plaintiffs in payment, if the evidence satisfies them that such was the fact:" *Held*, that this request presented substantially a correct view of the law, and the court erred in declining to charge accordingly.

Heard October 4th. Decided October 11th.

Error to St. Joseph Circuit.

Defendants in error, composing the firm of Secor, Berdan & Co., brought suit in the court below, against plaintiffs in error as persons composing the "White Pigeon Farmers and Mechanic's Mercantile Association," to recover the amount of an account for merchandise sold the Association. The defense, among other things, was that the demand had been satisfied by the receipt, by Secor, Berdan & Co., of notes of May & Cloyes, two members of the Association, in payment. The testimony taken to prove this payment was as follows:

Maro Wheeler, testified: "I am in the employ of the plaintiffs, and have been for four years. I am their principal book-keeper, and have travelled some in selling goods, and collecting for them. I am acquainted with the firm of May & Cloyes — the firm was composed of William B. May, and Josiah W. Cloyes. My impression is, that

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I sold the firm of May & Cloyes goods, prior to June, 1856, in behalf of Secor, Berdan, & Co. Orders which were received for goods, by Secor, Berdan & Co., were signed 'William B. May, Agent F. and M. M. A.' There was no arrangement between myself, as the agent of the plaintiffs, and William B. May, or any one else, as to how goods were to be charged when the money did not accompany the orders. I did not, in the fall of the year 1856, take the notes of May & Cloyes, or any other notes, for the debt that is now claimed of the defendants. I made no settlement at any time during the month of December, 1856, or January, or February, 1857, in behalf of the firm of Secor, Berdan & Co., with William B. May and Charles Cooper, or either of them; of my own knowledge, I know nothing of any note being sent by the plaintiffs, or either of them, to the firm of May & Cloyes, or to be returned by them to the plaintiffs, except that the amount of the goods claimed in this suit was sent by Mr. Secor to White Pigeon, and that a note signed by May & Cloyes was received in return; I learned this from Mr. Secor. The amount of said note was eight hundred and twenty-five dollars, and it was payable to the order of the plaintiffs. A portion of this note was paid, and for the balance, on the 10th day of August, 1857, I took, whilst at White Pigeon, three notes as follows: The notes were dated August 10th, 1856; one, for $203,42, payable 20 days after date, to the plaintiffs' order — signed by "May & Cloyes;" one of the same date, at 40 days, payable to same order, for $204,01, signed by "May & Cloyes;" and one of same date, at 70 days, by the same parties, and to the same order, for $405,58. The above notes are still held by the plaintiffs. I can not give the amount of the payments made on said note, nor by whom the said payments were made. I do not recollect of taking any orders myself, after December 1st, 1856. On examination of the plaintiffs' books, I find there was a bill

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of eighty-eight dollars and forty-eight cents, sold to May & Cloyes by the plaintiffs, on the 26th of December, 1856. In the month of August, 1857, I made an exchange of notes with the firm of May & Cloyes, by delivering to William B. May the note of May & Cloyes, and receiving therefor the three notes described above. After the insolvency of May & Cloyes, I called on May, and asked him for payment of the notes.

"The plaintiffs, previous to the 1st of June, 1856, had had some dealings with May & Cloyes, which commenced May 12th, 1854, and continued until April, 1855. After that time, the plaintiffs sold goods to the "Farmers' and Mechanics' Mercantile Association," of White Pigeon, in which plaintiffs supposed May & Cloyes were interested; the orders were in the name of the Association — the goods were invoiced in their name, and shipped to them. The amount of goods sold to the Association as above was three thousand one hundred and seventy-six dollars, and twenty-two cents; and the amount remaining due, unpaid, is about six hundred and fifty dollars. The goods were ordered by William B. May, claiming to be the agent of the "Association." The notes taken by me, in August, 1857, were taken as an extension of the old note: the proposition was, to divide the old note into the three, as stated, at 20, 40, and 70 days, in order that they might be met more readily."

Joseph K. Secor, testified: "I am one of the parties plaintiffs: am acquainted with William B. May: have been acquainted with him some years, as the acting man of the firm of May & Cloyes, and as agent of the White Pigeon Farmers' and Mechanics' Mercantile Association; he claiming to be such agent. We did business with the firm of May & Cloyes, one or two years previous to June, 1856. I do not remember when I first received information of the revival of the firm of May & Cloyes. I find goods charged to the firm, December 26th, 1856, and presume

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we had information of the revival, at that time. I find by the books of our firm, that on the 6th of March, 1857, there was a settlement made with the White Pigeon Farmers' and Mechanics' Mercantile Association, they being credited with bills receivable to the amount of eight hundred and twenty-five dollars, which covers the balance for which this suit is brought. I do not recollect who signed said note for which credit was given. A part of this note was paid, and for the balance, May & Cloyes sent their note, but not under any agreement on our part with them, in relation to it. There was no express agreement on our part to take their note; but it was sent, and retained by us; subsequently, the last mentioned note was given up, and three taken instead, which we still hold. I have no recollection of sending to, or receiving any other notes from, May & Cloyes. The consideration of any notes we have received from May & Cloyes was goods sold to this Association; but I have no recollection of sending any notes to them for their signatures. The notes were given for the goods for which suit is now brought." We still hold the three notes of May & Cloyes. We have made efforts to collect them, and have solicited payment of May & Cloyes of their notes: we did so soon after they matured; endeavored to get security on them, at that time, from them."

From the bill of exceptions it appears that defendants insisted that this evidence was sufficient to bar the plaintiffs of their action. But "the said Circuit Judge did then and there declare, and deliver his opinion to the jury aforesaid, that the said several matters so produced and given in evidence, on the part of the said defendants, were not sufficient to bar the said plaintiffs of their action aforesaid." And defendants excepted.

The counsel for defendants then requested the Circuit Judge to charge the jury as follows:

That it was not absolutely necessary to show an ex-

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press agreement on the part of the plaintiffs to receive the note of May & Cloyes, in payment of their claims against the defendants; but that if the jury find, from all the circumstances, and the subsequent acts of the plaintiffs in regard to said note, and in taking new notes of the makers, and extending the time of payment, they had acted and treated said notes as their own, and as received in payment of their claim, then the jury are authorized to take such facts into consideration, and find that the note was so received by the plaintiffs in payment — if the evidence satisfies them that such was the case.

This charge, the Circuit Judge refused to give, but did charge the jury:

"If the jury find, from the evidence, that the plaintiffs did sell and deliver goods to the defendants, as they have alleged in their declaration, and that the goods came to the possession of the defendants, and were received by them, then the defendants are liable.

"If the plaintiffs received the notes of May & Cloyes on the debt of the defendants, this will not discharge the defendants, unless the plaintiffs received the notes as payment.

"If May & Cloyes were members of the White Pigeon Farmers' and Mechanics' Mercantile Association, and were liable with the other defendants, to the plaintiffs, the taking of their notes by the plaintiffs would not discharge the other defendants, unless the plaintiffs agreed to receive the same as payment."

Defendants' counsel excepted to the whole charge, and the jury having returned a verdict for plaintiffs, defendants brought error.

W. Saviers, and *C. Upson*, for plaintiffs in error.

H. H. Riley, for defendants in error.

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CHRISTIANCY J.:

The main question in this case was, whether the paper of May & Cloyes was received by the plaintiffs below in payment of their claim against the defendants? That the paper must have been so received by the plaintiffs, to make it operate as such payment, was admitted by the defendants' request to charge, and it does not appear to have been a disputed question. But the real question in connection with this point was, by what kind of evidence it was competent for the defendants to show that the paper in question was so received? The defendants' counsel requested the court to charge, "that it was not absolutely necessary to show an express agreement on the part of the plaintiffs to receive the note of May & Cloyes in payment of their claims against the defendants; but that if they find, from all the circumstances of the case, and the subsequent acts of the plaintiffs in regard to said note, and in taking new notes of the makers, and extending the time of payment, they had acted and treated said notes as their own, and as received in payment of their claim, then the jury are authorized to take such facts into consideration, and find that the note was received by the plaintiffs in payment — if the evidence satisfies them that such was the fact."

This request raised the question, what kind of evidence the jury were authorized to consider as bearing upon the question of the receipt of the note in payment. And this was a very material question, in the aspect in which the case appeared upon the evidence. This charge the court refused to give; but did charge that the receipt of the note by the plaintiffs would not discharge the defendants, "unless the plaintiffs received the notes in payment;" and this is the whole of the charge in reference to the question of the reception of the notes by the plaintiffs. This charge, though correct, so far as it went, entirely evaded the question of

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the kind of evidence which it was competent for the jury to consider as bearing upon the point in dispute, and left to the jury only a question about which there was no controversy.

But this charge, taken in connection with the request to charge, and the refusal of that request, necessarily, we think, left the jury to infer that it was necessary to show an *express agreement* on the part of the plaintiffs to receive the paper in payment, and that they would not be authorized to find that it was so received, from all the circumstances and the subsequent acts of the parties, referred to in the request. And they must also have inferred, that an express agreement must be shown by direct evidence.

We do not understand this to be the law. We are aware of no rule, and can discover no reason, why direct evidence of an express agreement should be required in such a case. If such was the understanding and assent of the parties, it was sufficient. And that such was the understanding of the parties, may, we think, be proved by the subsequent acts and conduct of the parties, as well as by direct proof. The weight of such evidence, is, of course, a question for the jury. We think the request of the defendants presented substantially the correct view of the law, and the court should so have charged.

The judgment must be reversed, and a new trial granted.

The other Justices concurred.

Austin A. Belden v. William P. Laing and others.

A plea in abatement must have the highest degree of certainty and precision. Every allegation necessary to make out the case covered by it, must be distinctly, and not inferentially, set forth.

In an action of replevin a plea in abatement was interposed, setting up the pendency of a prior suit in replevin, by virtue of the writ in which the property in controversy was taken and held by one of the defendants, who was sheriff

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of the county. The plea did not allege that any affidavit was attached to the writ in the first suit, nor that the writ commanded the sheriff to take the property in controversy. *Held*, that the plea was insufficient on both grounds.

In an action of replevin under the statute, anything going to show that the plaintiff had no right to the possession when he commenced his suit, is a complete bar to the action. As that the defendant lawfully held the property, as against the plaintiff, by virtue of a prior writ of replevin.

In replevin by one plaintiff against three defendants, plea in abatement was interposed, of a prior action in replevin, by two of the defendants against the plaintiff and another, by virtue of which the other defendant, as sheriff, took and detained the property. *Held*, that the issues in the two cases were not identical, as the possessory right of the sheriff under his writ, if valid, could not be impaired or affected, although the plaintiff in the present suit might show a perfect title as against the other defendants, the plaintiffs in the first suit.

Heard April 19th. Decided October 18th.

Error to Shiawassee Circuit.

Replevin by plaintiff in error against William P. Laing Amos Gould and Ebenezer Gould. The defendants pleaded in abatement as follows:

"And the said defendants Amos Gould and Ebenezer Gould, in person, and William P. Laing, by A. & E. Gould, his attorneys, come into court and pray judgment of the said writ and declaration of the said plaintiff, and that the same may be quashed, because they say that heretofore and before the commencement of this suit, to wit, on the ninth day of March, 1859, the said defendants Amos Gould and Ebenezer Gould, commenced a suit in replevin against the said plaintiff and one Cranson Belden, by issuing a writ of replevin out of the Circuit Court for the county of Shiawassee, to the Sheriff of said county, which writ was duly and personally served upon said plaintiff and said Cranson Belden, and under and by virtue of which said writ, the same identical goods and chattels mentioned in said plaintiff's writ and declaration in this cause, were seized and taken by defendant William P. Laing, said Laing then being the Sheriff of Shiawassee county, and said goods and chattels having been seized and replevied by said Laing, as such Sheriff, and being in the possession of said Laing as such Sheriff,

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by virtue of said writ, at the time of the commencement of this suit; which said suit so commenced in said court, against said plaintiff and said Cranson Belden, is now pending and undetermined, and that said plaintiff's said action of replevin herein is brought against the defendants for the recovery of the goods and chattels, so as aforesaid taken, replevied and detained under and by virtue of said writ of replevin, issued as aforesaid by said Amos and Ebenezer Gould, against said plaintiff and said Cranson Belden, and this the said defendants are ready to verify; wherefore as to the unlawful detention of the said goods and chattels in the said plaintiff's declaration mentioned, they pray judgment of the said writ and declaration of the said plaintiff, and that the same may be quashed."

To this plea the plaintiff demurred. The Circuit Court overruled the demurrer, quashed the writ, and rendered judgment for defendants, for the value of the property replevied, and costs. Plaintiff brought error.

McCurdy & Raynale, for plaintiff in error.

A. & E. Gould, for defendants in error:

The plaintiff can not replevy property which has been taken from him and is held by a writ of replevin:—*Comp. L.* § 5041; 5 *Wend.* 71. The object of this action was to determine the title to the goods replevied, as between A. A. Belden and these defendants; and the first action was brought, and at the time of the commencement of this suit was pending, for exactly the same purpose. The first action was properly pleaded in abatement:—*Gould Pl.* 282; 1 *Chit. Pl.* 453; 3 *Wend.* 258; 1 *Mich.* 254. It is no objection that the parties in the two suits were different, since the question involved in this suit between the parties hereto was directly in issue between the same parties in the former suit:—*Cath.* 96; *Comp.* 144; *Holt*, 1; *Show.* 75; 1 *Pet. Abr.* 16, *case* 5; 5 *Wend.* 71.

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CAMPBELL J.:

The demurrer, we think, ought to have been sustained, whether we look at the form of the plea, or the subject matter sought to be introduced by it.

A plea in abatement must have the highest degree of certainty and precision:—1 *Chitty Pl.* 395; *Findley v. People*, 1 *Mich.* 235—and therefore every allegation necessary to make out the case covered by it must be distinctly and not inferentially set forth. This plea would require some liberality to sustain it if put in as a plea in bar, under any system of special pleading. To say nothing of other omissions, it contains no allegation from which we can infer that the writ of replevin, under which it alleges the property to have been first taken by Laing, as Sheriff, was directed against the property levied upon. If a Sheriff, with the most regular writ, should seize property not described in his writ, he certainly could not justify under it. Neither does it appear that any affidavit was annexed to the writ, without which the Sheriff is expressly forbidden to serve it:—*Comp. L. p.* 1331, § 5011 These and other omissions, not perhaps so substantial, would render the plea demurrable, if a plea in abatement were proper at all.

But we think the defense, if valid, should have been offered in bar, and not in abatement. The object of our statutory replevin is to determine the right of possession at the commencement of the action, as well as title to the property for temporary or permanent purposes connected with that possession. Anything going to show that the plaintiff in replevin had no right to the possession when he commenced his suit, is a complete bar to his action. And proof that a Sheriff had taken property on a lawful writ from the plaintiff, and continued lawfully to hold it under that writ, when replevin was brought, would go to negative the plaintiff's right of possession, and, of course, defeat his suit. The statute requires an affidavit that the plaintiff is entitled to

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the possession, that the defendant unlawfully detains the property, and that it has not been taken by any of various kinds of process enumerated; but does not in terms require anything more. These facts, if true, cover every case which could ordinarily arise. If untrue, they go to defeat the right of action entirely, as existing at that time, not only in that suit, but in any action whatever depending on a right of possession. Such a showing is not the ordinary office of a plea in abatement, which, in respect to a former suit pending, does not deny or put in issue the cause of action, but merely objects that it is already in course of litigation.

Whether cross replevins between the same parties will lie, where no new parties are introduced, is a question entirely beside this case. It may be worthy of consideration however, whether, under a plea in abatement, if it lies, the statute provides for a return of the property, or an assessment of damages. It may be found that the provisions on this subject have a bearing on the question of pleading. We are not disposed to consider these questions any further than may be necessary in this case.

In the present case, the plea does not show any identity of issues, and it would be impossible in the present action to try the merits of the former action. In that, the question involved was simply the title of the Goulds to possession as against the two Beldens; all the other questions of title and damages being incidental, and that being the only ground on which the action was maintainable. In the present action, the question of *possessory* right arises—according to the plea—not between Belden and the Goulds, but between Belden & Laing. And Laing's possessory right, if his writ was valid, could not be impaired or affected, although Belden might show a perfect title as against the Goulds. The issues are entirely different upon the right of possession, which is the only foundation of either action.

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Judgment must be reversed with costs, and the defendants are required to plead over.

MANNING and CHRISTIANCY JJ. concurred.

MARTIN CH. J., *dissenting:*

Although our statute does not, in express terms, prohibit the bringing of a counter replevin, by a defendant whose property has been taken by a former writ, yet upon every principle, and by every analogy of law, such a proceeding is void. Under the former suit pending, the issue to be tried is the detention of the goods and chattels replevied, the plaintiff's property therein, and his right to the possession of them. Under a counter replevin the same issue, but reversed, is tendered. The identical cause of action is consequently the subject of both suits, and the rule that two or more suits for the same identical cause of action will not be tolerated, but that the pendency of one is good cause for abatement of that subsequently brought, is too familiar a rule of pleading to require demonstration. It is, in general, a good plea in abatement, that there is a prior action (similar or concurrent) pending between the same parties for the same cause; and such plea of a prior suit pending for the same cause, is good, although there be a new defendant added in the second; and when on the other hand, one of two or more defendants in the first action is omitted in the second, the second must abate, the case being plainly within the general rule:—(See *Gould's Pl.* §§ 125, 127). As a corollary of this rule, it follows, that when one of two or more defendants in the former action brings suit against the plaintiff for the same cause of action, the second must abate. Hence, while the statute enumerates certain cases in which replevin shall not be brought, it does not mention a former replevin, because the well established rules of pleading already prohibited it.

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In *Dearmon v. Blackburn*, 1 *Sneed* 390, it was held that replevin does not lie when goods are taken by process of law, by the parties against whom the process issues, but only by a stranger to the process, whose goods are taken; and that parties and their privies are affected by the writ; and the objection that goods were not subject to seizure, is proper ground of defence to the first action, but will not authorize a counter replevin. In *Morris v. De Witt*, 5 *Wend.* 71, it was held that a writ of replevin issued by a defendant, to obtain re-deliverance of property taken from him by virtue of a writ of replevin issued against him, is irregular, and will be superceded with costs, upon motion, if the motion be made before the return of the writ, or set aside if made after. The court in that case did not wait for a plea in abatement, and in giving judgment, Savage Ch. J. employed language which is pertinent to the case at bar: The law, he says, "has provided guards against abuses in practice under the writ of replevin," by requiring a bond and affidavit, &c. "Now all this is a very useless proceeding if the defendant in replevin has a right to turn round and bring his action of replevin, and thus regain possession of the property which has been legally taken from him. If such a proceeding were permitted, there would be no end to suits, and the benefit of this action could never be realized. The title to the property in question must be tried upon an issue regularly joined, and until such trial, the party from whom the property has been taken by the process of law must remain out of possession." When a writ will be quashed or superceded for such a cause, the suit may be abated, as well. Now, because one of two defendants, from whom property has been replevied, claims it in his own right, he certainly can have no right to a counter replevin; for the whole question of title, and the right to possession, is the subject of trial in the first suit; and, as a party, he must litigate it in such suit. Besides, the plaintiff in replevin must sub-

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stantiate his own right to the possession of the goods replevied, and can only have judgment upon doing so; and he can not rely upon the defective title or right of the defendants for a recovery. There can, therefore, by no possibility, be any issue presented in the second suit, which must not necessarily be determined in the first; for the question of the defendants', and each of their titles, could be raised for the purpose of defeating that set up by the plaintiff, and it can never be set up for any other purpose. The title of the plaintiff in this suit is therefore directly within the issue to be tried in the former suit.

The fact that the Sheriff in whose possession the goods were, by virtue of the first writ of replevin, is made a co-defendant in this suit, renders the impropriety of this proceeding the more manifest, while it does not, in my apprehension, drive these defendants to a plea in bar, and thus compel them to litigate in two actions substantially the same rights. For these reasons, I think the demurrer was properly overruled.

But my brethren further hold that the plea is bad as a pleading. Whether it would be held good or bad upon special demurrer is immaterial, but I can discover no reason why, upon a general demurrer, it should not be upheld. It avers, in substance, that an action of replevin was then depending between two of these defendants, and this plaintiff and one Cranson Belden, under which the identical goods were taken and held by Laing, as Sheriff; and that this action is brought to re-replevy the same goods. This was substantially sufficient, and if otherwise defective, the error should have been specially pointed out. I can conceive of no case in which a counter replevin may not be met by a plea in abatement, and upon principle, I think there should be none.

Judgment reversed.

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Eber B. Ward v. William Warner and another.

The general nature of the action of assumpsit considered.

A canal through a marsh in which a stream is lost, cut by private individuals through the land of one of them, for the purpose of affording floatage for timber and lumber through the same in connection with the stream—there being no evidence that the waters of the stream ever ran along its line, or that it was the improvement of an existing water channel—is a *private* way, and the public are not entitled to use it, unless it be dedicated to their use.

The owner of the land on which such canal was dug, and who appeared to have incurred the major part of the expense of making it, gave notice to other individuals who had contributed to its repair, that they must compensate him for its use at a rate which he specified in his notice; and on their refusal and continuing its use under a claim of right to do so, brought action in assumpsit to recover compensation for the use.—*Held*, that the action could not be maintained.

The law will not imply a promise to make compensation for the use of the canal before the notice was given, and while it was permitted by the plaintiff without objection, and without demand of compensation.

Nor will the law imply such a promise after the notice, since any implication of a promise is precluded by the denial by defendants of all right to compensation, and the assertion of an adverse right in themselves. The adverse entry, if the claim of right is unfounded, is a naked trespass, upon which no duty to compensate arises which can be converted into a contract.

Heard October 28th 29th, and November 2d, 1859. *Decided October 13th.*

Error to Wayne Circuit.

Ward brought assumpsit in the court below, against William Warner and Albert L. Catlin, and declared for the use by defendants of a certain canal across lands of the plaintiff, in St. Clair county, in floating the logs and lumber of the defendants in and through the same. On the trial, the following stipulation was read in evidence.

"In the Circuit Court for the county of Wayne: Eber Ward v. Albert L. Catlin and William Warner.

It is hereby stipulated that on the trial of this cause it shall be admitted as follows:

That in 1853, the plaintiff, Willard Parker, and some other gentlemen interested as owners of pine lands on Mill Creek, conferred together about opening or digging a canal at the spot where the canal now claimed by the plaintiff was afterwards built. That, with a view of car-

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rying out this idea, plaintiff bought certain lands through which the canal now runs, a part at the Swamp Land sale in the fall of 1853, and a part, being primary school lands, in 1854. That the legal title of said lands is still in the plaintiff. That in the summer of 1854, the plan was settled as follows: It was estimated that the entire cost and outlay, of carrying out the entire enterprise, would be $5000, which sum was divided into five equal shares, of which the plaintiff was to pay one, Willard Parker one, the Messrs. Moore one, Messrs. Smith & Dwight one, and the remaining fifth it was supposed might be paid by other parties. And the parties whose names are above mentioned all agreed to the same. That after this was so agreed on, the plaintiff proceeded and made a contract for building the canal, and cleaning out a part of Mill Creek [of which a copy was attached], and plaintiff paid therefor $5,000, the contract price.

That the said Parker and the Messrs Moore paid to the plaintiff $1000 each, as their share of the said outlays, and said Smith & Dwight have always acknowledged their liability so to do, but having failed in business, have been unable so to do.

That the object of making the said canal, was to concentrate and confine in a channel, so as to afford floatage for logs and rafts, the waters of Mill Creek, which then in that locality were spread and diffused over a large marsh. That said canal was dug, and the waters of said creek drawn through it, in 1854, and have so continued to run ever since; and it now constitutes the bed and channel in which said water of said creek runs.

That the waters of Mill Creek were, before the building of said canal, navigable both above and below said marsh, and said canal operated to carry said waters in a navigable channel through said marsh. That said canal is about two miles long, about sixteen feet wide, and four feet deep.

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That large amounts have been expended by different individuals, in cleaning out the channel of said creek, both above and below the said canal.

That, in 1855, it was found necessary that the upper end of the canal should be enlarged, to make the navigation more practicable, and that Mill Creek below the canal should be improved; and that for these purposes the expenditure of $1000 was necessary. This work was done, and the amount contributed by the said Parker, the plaintiff, the Messrs. Wrights and the defendants, each paying $250. Of this $1000, about $250 was expended in the upper end of the canal itself; the balance in the creek below. The plaintiff took no active part in having this work done. Mr. Willard Parker advised it, and plaintiff agreed to pay one-fourth its cost. Mr. Parker himself procured the other contributions. He also employed and paid the workmen, and superintended the work. The plaintiff paid the $250 to Mr. Parker, or upon his order.

That the first intimation the defendants had that claims were made against any persons for the use of said canal, was derived from the printed notice [copied below, marked B] which was posted in June, 1857. That no claim was made on defendants personally, till August, 1857, when an account was sent them, and payment demanded. A letter of Towle, Hunt & Newberry was handed them about September 4th, 1857, a copy of which, and of the answer thereto, are given below, marked C and D. That defendants never assented to any liability to pay for the use of the said canal, but always claimed a right to the free navigation of the same." [The stipulation then gives the quantity of logs run by defendants through the canal, in 1856, 1857 and 1858, specifying the amount before and after the demand of payment, and gives a statement from which it appears that plaintiff expended in buying said land, and in and about work on said canal, $7302,03, and received upon the same from Parker, Carlton, Smith and Moore, and Moore & Foote, $3091,48].

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The following is the notice, marked B.

"Notice. All persons who have run logs through the canal made by E. B. Ward and others, in St. Clair and Lapeer counties, connecting Mill Creek, are hereby notified that they will be charged 25 cents per 1000 feet for all logs that have heretofore been run or that may hereafter be run through said canal, until the tolls are paid in advance, or arranged for with the subscriber.

Parties owning lands above the canal may commute by paying a fair *pro rata* proportion of the cost of said canal, for the privilege of running logs from specified lots without paying tolls.

All parties having used the canal during the past year, are hereby requested to call at their earliest convenience, and settle the tolls now due.

E. B. WARD."

DETROIT, June 1, 1857.

Letter marked C.

"DETROIT, September 4th, 1857.

GENTLEMEN: E. B. Ward has placed in our hands, for collection, a claim against you for the use of his private canal in Lapeer and St. Clair counties. As you are well aware, he expended some $7000 or $8000 in those improvements, and in common justice and honesty, those who are benefited by it ought to have honor enough to pay their proportion of such outlay, or a reasonable sum for the quantity of logs they have run through the canal. Had *you* built such a canal, and others used it, most certainly you would have thought you had a fair claim for payment. Unless these claims against you and others are settled upon a reasonable basis, either payment by the thousand for logs run through, or a share of the expense of building the canal, according to the amount of land benefited, we shall be compelled to put the matter in suit, and the canal will be permanently closed. We hope that your own sense of justice will influence you to offer fair terms of arrange-

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ment, which will be met in the same spirit." [Signed, &c.]

Reply, marked D.

"DETROIT, September 5th, 1857.

TOWLE, HUNT & NEWBERRY,

Detroit, Michigan:

GENTLEMEN: Your letter of the 4th instant, relating to the claim of E. B. Ward, Esq., against us, for the use of the canal mentioned, was duly received, and in reply we have to inform you, and through you, Mr. Ward, that we do not admit any liability whatever arising from the use of that ditch, and decline complying with your request.

It may so happen that our business, as a firm, now constituted, will not make it necessary for us to use that ditch in the future; but should it become necessary, we do not expect that Mr. Ward will take on himself the responsibility of refusing us its full and free use in common with himself and others, and without charge.

Respectfully and truly yours,

WILLIAM WARNER & Co."

In addition to these documents, plaintiff introduced evidence, tending to show that the marsh through which the canal was dug was not, before that time, navigable for logs, or rafts, or boards; that it was extensive, covering about one third part of a township; and that the stream above had never been used for floating logs before the canal was constructed. He also gave evidence of the great value of the canal to the owners of timbered lands near it, and as to what would be a fair compensation for the use of the canal. The defendants proved by a witness that, before the canal was made, the creek was lost in the marsh for a distance of some two miles; that there were in the marsh one or two open spaces filled with water, and he thought that perhaps the channel of the creek had been, at some former time, at those spots.

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The court instructed the jury:

1. In order that the plaintiff shall recover, he must show that there has been a promise, either express or implied, on the part of the defendants, to pay for the use of the canal. It is not claimed that there is an express promise. The question, then, is, was there an implied promise?

2. If it were shown that Mill Creek ended in the marsh, and that a new distinct stream came out below, then it might be that the plaintiff, on digging a canal through the marsh over land owned by him, might forbid parties using the canal, unless they would agree to pay for such use. But if the jury believe, from the evidence, that there had been at some former period a continuous channel through what is now a marsh, which has been by some natural means nearly filled up, and the waters diffused over the marsh, and that the canal which was dug by the plaintiff had the effect simply to concentrate the waters of Mill Creek, into one body, then the plaintiff can not require pay for the use of such canal, or debar others from using it on their refusing to pay.

3. Even if the plaintiff could require pay for such use, yet if the jury believe from the evidence that the defendants used the canal for floating logs, and that on being required to pay for such use, they refused, and denied the right of the plaintiff to charge therefor, and claimed the right to use the canal free of charge, then no promise to pay can be implied. The defendants were at the most but trespassers, and no action of assumpsit will lie against them.

The plaintiff excepted to these instructions, and requested the court to charge the jury:

1. That if the jury believe, from the evidence, that Mill Creek was lost in the marsh, or the waters so diffused that that they were not navigable for logs or boats for a distance of two or three miles, but had made their way

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through the marsh, in a great number of small rivulets or streams, and that they had been so for a long period of years, and that the said marsh had never been used for navigating logs, then the said marsh or its waters were not "public" within the meaning of the law, and the plaintiff, owning the land, owned the waters exclusively, subject only to the rights of other persons to the use of the water on their own land, and their right to have the waters continue to flow through the marsh as they had always done.

2. If the jury believe, from the evidence, that the plaintiff created on his own lands the canal in question, and that it was created at a place where there was before no navigable stream through which logs could be floated, and that by means thereof a floating way for logs was afforded, and that the plaintiff has not, as the defendants well knew, dedicated the said canal to the use of the public; then he can recover from the defendants in this action, who shall have used the canal, knowing the said facts, a compensation for such use; such compensation to be, in the absence of any express or implied agreement as to the price, such sum or rate as to the jury shall, from the evidence adduced, seem to be reasonable.

3. If the jury believe, from the evidence, that the plaintiff at any time gave express notice to the defendants, that if they used the canal for running logs, they would be required to pay for such use at the rate of twenty-five cents per thousand feet of logs so run, and that the defendants did afterwards use the canal and run the logs through, then the plaintiff may recover of the defendants at that rate for the logs so afterwards run.

4. That if the jury believe, from the evidence, that the canal was used by the defendants without the express previous consent of the plaintiff, and that their acts amounted to a trespass, yet the plaintiff may waive such trespass, and sue in assumpsit to recover compensation for such use.

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5. If the jury believe, from the evidence, that the plaintiff did not obstruct the entrance to the canal, or forbid the defendants absolutely from using it, but on the contrary left the canal open and unobstructed throughout its whole length, but with the intention, as the defendants well knew, to require pay for its use, then such acts on the part of the plaintiff amount to a permission to the defendants to use the canal, and the plaintiff may recover compensation for such use in an action of assumpsit, notwithstanding the defendants may have always denied their liability to pay, and claimed the right to use the canal free of charge.

All which instructions the court refused to give as requested, and plaintiff excepted.

The jury having found for defendants, plaintiff brought error.

Towle, Hunt & Newberry, for plaintiff:

Mill Creek not being navigable through the marsh, the party making it so through his own lands, by a canal, may withhold its use from the public, or authorize its use by persons who shall pay a compensation, and withhold it from others:—*Angell on Watercourses*, §§ 539, 540; 2 *Fairf.* 278; 28 *Me.* 554: just as a person might construct a wharf and charge toll for its use:—13 *Wend.* 288.

The acts of plaintiff shown in this case amount to a *license* on his part to all persons to use the canal in floating logs, and he could not bring trespass for such use. The case is analogous to that of a warehouse, or inn, or a dock upon public waters:—See 2 *Watts & S.* 141; 12 *Johns.* 408; 2 *Denio*, 625; 20 *Barb.* 251; *Six Carpenter's Case*, 8 *Coke* 290, 1 *Smith Lead. Cas.* 62. Or of a private road, over which persons are permitted to pass on paying toll:—8 *Price* 535; 3 *T. R.* 606; 7 *B. & C.* 257; 11 *M. & W.* 827; 8 *Ad. & E.* 99; 6 *Barb.* 265; 2 *M. & S.* 436.

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That defendants claimed a right to use the canal free of charge can not make them trespassers. The license to enter did not depend upon prior payment or promise to pay.

A promise to pay will be implied, notwithstanding the express refusal and claim of right on the part of defendants. They have received a substantial benefit, and the law will *imply* an assumpsit in the absence of an express one. In such a case, a refusal to pay can not avail: the law says he *shall* pay, and the law is paramount:—6 *N. H.* 499; 2 *Watts & S.* 163; 4 *Cush.* 473; 2 *Fairf.* 278; 2 *Greenl.* 404; 3 *Barn. & Adol.* 411; 13 *Johns.* 240; 6 *N. H.* 298; 3 *Mich.* 566; 1 *Handy*, 459; 9 *N. H.* 494; 16 *Ill.* 160.

Even if defendants were guilty of a trespass, yet plaintiff might waive the tort and sue as upon an implied contract. To this point, counsel cited:—3 *N. H.* 384; 22 *Vt.* 624; 10 *Mass.* 436; 14 *Penn. St.* 295; 1 *Mo.* 430; 3 *Eng.* 202; 3 *Hill* (*S. C.*) 248; 13 *Wend.* 139; 1 *Hill*, 234; 1 *B. & C.* 94; 2 *Taunt.* 274; 3 *M. & S.* 192; 1 *Taunt.* 112; 3 *N. H.* 272; 5 *Cow.* 480; 6 *Johns.* 274; 1 *Hempst.* 243; 4 *Eng. L. & E.* 494; 2 *Nott. & Mc.* 156; 16 *Ill.* 106; 9 *N. H.* 494; 6 *Johns.* 46; 13 *Johns.* 489; 4 *Dana*, 295; 3 *B. & Adol.* 411; 2 *Strange*, 1239; 1 *Wils.* 115.

D. C. Holbrook, and *G. V. N. Lothrop*, for defendants in error:

It is true that the law sometimes *implies* a promise; but only in cases where the *facts* on which the implication is raised are deemed equivalent to a promise:—3 *Mich.* 572; 8 *M. & W.* 120, *and note.*

If it were otherwise, we should have the extraordinary spectacle of the law creating promises for a man entirely independent of his action.

Hence it has been decided, that the law will not imply a contract against a man's express declaration:—7 *Mass.* 107.

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And our own Supreme Court, governed by the same principle, have held that, where an express promise existed, no *implied* could be set up:—1 *Doug. Mich.* 335; see also 1 *C., M. & R.* 312.

But there are a certain class of cases where it is said, to adopt the usual expression, that "tort may be waived and assumpsit maintained." The expression is in itself vague, and has often been vaguely employed. It imports no limitation in itself, and has sometimes been applied with considerable latitude.

The doctrine, so far as our observation extends, is first declared in a case in Lord Raymond's Reports, where it was held that securities being unlawfully *detained and sold*, the plaintiff might "*dispense with the wrong, and suppose the sale made by his consent*," and bring an action for money had and received:—2 *Ld. Raym.* 1216. This doctrine was sanctioned by Lord Mansfield, in *Doug.* 138; *Coup.* 416; *Ibid.* 372. A careful comparison of these cases will show that Lord Mansfield did not extend the doctrine beyond this: that the action might be maintained for the *proceeds of the goods sold.*

In *Bennet v. Francis*, decided in 1801, Ch. J. Alvanley, after reviewing the cases, affirms that "all that is to be collected from the cases is this, that if the goods be converted into money, the court will allow the plaintiff to waive the tort, and to bring an action in which he can recover no more than the sum actually received."

In this country there has been much latitude of *dictum*, and unquestionably some of decision. But a summary of the cases will show a great preponderance of authority in favor of the rule as above laid down. The cases can be generally classified as follows:

1. That where goods have been taken tortiously and *sold*, the plaintiff may waive the tort and sue in assumpsit for the proceeds, and not otherwise:—5 *Pick.* 285; 12 *Pick.* 123; 22 *Vt.* 624; 3 *Watts*, 277; 1 *J. J. Marsh.*

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543; 3 *Dana*, 552; 12 *Geo.* 422; 6 *Rich.* 159; 13 *Ill.* 688; 3 *Wis.* 649; 4 *Chand.* 166; 2 *R. I.* 418; 2 *Scam.* 317.

2. There is another class of cases, the principle of which, so far as any can be discerned, is this; that though the taking of goods was tortious, yet if they may be valuable to the defendant, their value may be recovered in an action of assumpsit; generally on a count for goods sold and delivered:—3 *N. H.* 384; 3 *Eng.* 202.

In each of these cases the defendants came lawfully into possession of the goods, but converted them to their own use, and a recovery was allowed on counts for goods sold and delivered. On such facts perhaps it is reasonable to imply a promise to pay the value of the goods:—See also 14 *Penn. St.* 295; 15 *Ohio*, 9; 1 *McMullen*, 21.

In some of the above cases it is said, that a man shall not be permitted to say he committed a wrong, in order to exclude the implication of a promise. This, we think, poor talk for Judges. If it had any force or reason it would make assumpsit concurrent with every tort. It would also make *implied* promises mere fictions of law.

The theory of our remedies is grounded in the idea of a substantive difference between contracts and torts. And such is the truth. Fictions of law are only excusable when necessary for justice. When, however, our remedies are complete without them, and when they confound both reason and language, they ought not to be tolerated.

The right of waiver and election is a very limited one, and it extends only to personal property, or to the value of the services of servants, &c. It is not permitted in cases of trespass on lands—and *a fortiori*, it can not be where the alleged trespass is made under a claim of right:—6 *S. & R.* 476. The action of *assumpsit for use and occupation* furnishes a large class of cases in illustration of this position. It is held everywhere that this action does not lie where there is a claim of adverse right. And not that only, but that the relation of landlord and tenant (which

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is a relation of contract) is necessary to sustain it:—13 *Johns.* 489; 15 *Barb.* 36; 11 *Pick.* 1; 6 *N. H.* 298; 3 *S. & R.* 500; 2 *Nott & Mc.* 156; 1 *O. S. R.* 222; 30 *Me.* 58; 35 *Me.* 200; 6 *Ind.* 412; 15 *Ill.* 61; 16 *Ill.* 24; 16 *Ill.* 145; 16 *Ill.* 26; 16 *Ill.* 106; 19 *Geo.* 313; 24 *Ala.* 420; 26 *Miss.* 94; 5 *Eng.* 602.

MARTIN CH. J.:

The first question presented, and which disposes of this case, is whether, upon the facts, assumpsit will lie, or whether the plaintiff's remedy, if he have any, be not trespass.

Whenever a benefit accrues to a party, whether for services rendered, money expended, or property used, or from any other cause, upon which a duty to make compensation to another arises, the law will, in the absence of an express promise to make such compensation, imply one from the transaction and the duty. Thus if A performs labor or renders services for B, at the latter's request, or with his knowledge and assent, but without a contract for compensation, the law will imply a promise by B to pay A therefor what such labor or services shall be reasonably worth. So when the goods of A have been wrongfully taken or held by B, and sold, although the act of B in taking them, or in their conversion, may have been tortious, yet as he has sold them, and received a benefit from such conversion, A may waive the tort, and bring assumpsit for the price for which they were sold. So when a party enters upon land under a contract to purchase it, which is not performed, and such party is, after such failure of performance, notified that, if he remains in possession, he will be required to pay rent; if he remain, the law will imply a promise to pay rent from the time of such notice. But in the latter case, there can be no promise implied to pay rent for the occupation while the contract was in force, because no payment of rent could, during that time, have been in the contemplation of either party, and no such duty existed. And

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where one has the clear right to the use and control of property, and permits its use by others, upon condition of payment therefor, when the condition is specific in terms the law will imply from the use by one having knowledge of the terms an assent to them, and a corresponding promise to pay; and when not known, a promise of reasonable compensation. In the first case, the implication is founded upon the knowledge of the terms and conditions of the use, and in the latter upon the duty arising from the use; but in neither will it be made, when the party using it asserts adverse rights, and acquires and uses the property under an adverse claim of right. These are principles which, notwithstanding the diversity of opinion upon kindred questions, are clearly settled and recognized. But we are not aware of any principle upon which it can be held, that a mere naked trespass can be made the basis of an implied assumpsit. If the trespass be proved, no presumption of an agreement for compensation can be raised; for the act of an entry upon lands is in contravention of, and not in subordination to, the rights and claims of the party injured. For such injury the law has given a different remedy; and one founded upon the injury; and no promise can be implied to pay, but a liability arises to compensate for the wrong and injury.

It was said in *Hosmer v. Wilson*, 7 *Mich.* 294, that the liability, in cases of implied promises, is founded upon a duty which the law imposes upon the party receiving the benefit, to pay; and that this duty the law enforces under the fiction of an implied contract; and *Martin B.* in *Clay v. Yates*, 36 *E. L. & E.* 546, in speaking of the liability, says: "I should say the duty of the man to pay arises out of the transaction itself; and think this is a more correct expression than talking of an implied contract, when a contract was never made."

If, therefore, the plaintiff has a right to require com-

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pensation for the use of his canal prior to the notice of June 1st, from the simple fact that the defendants have used it, then a duty arises upon their part to pay such compensation, and the law will imply a promise to pay: but if he has no such right, no duty to pay arises from the assertion of such right, or from the fact of the use. Now the canal, upon the case presented, was clearly a private way. It is true that it was dug by contribution, and was for a time thrown open to all passers; and perhaps still is, to those who contributed towards its construction, or those who have since contributed towards keeping it in repair. But it was nevertheless upon the land of the plaintiff. No evidence exists, tending to show that the waters of Mill Creek ever ran along its line, or that it was the improvement of an existing water channel. Indeed, the contrary is evidently the case; and the fact that it was dug through a marsh (the land belonging to the plaintiff) in which the creek was lost, does not render it a part of the stream, so as to confer upon the public any rights of way along it.

It exists, then, as a way or passage, opened by the plaintiff, and which he might dedicate to the public, or reserve for his private use at his option. Whether those who joined with him in its construction have or have not the right of passage along it, or what their rights may be, are questions not before us; but so far, at least, as all others are concerned, no such right exists; for no dedication to the public is shown; nothing more than a sufferance of its use, which he might revoke at any time. For its use, while this permission existed, he had no right to demand compensation, nor will the law raise a duty to pay it.

But he had a right to require payment or compensation, before he would at any time suffer its use by individuals upon whom the right had not been specially conferred; and in such case, those using it would be liable

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to pay therefor according to the terms imposed, if assented to, or if used under circumstances from which the law would imply assent. In *Wadsworth's administrator v. Smith*, 11 *Me.* 278, which was assumpsit on an account for slipping logs along a stream which had been made floatable for logs and lumber by the application of artificial means at the expense of the owner, while the right to exact toll was questioned, it was held that a proprietor may open a passage through his land for his own accommodation, and he may permit others to pass it under an agreement for compensation which may be enforced at law. "He may yield the enjoyment to one and refuse it to another. If he receives compensation for such enjoyment, the law will permit him to retain it; if he accept a promise as an equivalent, the law will enforce it, and a promise may as well be implied in such a case as in any other."

The plaintiff, therefore, having, until the giving of the notice of June 1st, suffered the public to pass along his canal without objection, or making any demand for compensation, must be confined to his claim upon such use of the canal as occurred after such notice.

For the purpose of a revocation of the general license, and a declaration that compensation would thereafter be demanded, the notice, having come to the knowledge of the defendants, was sufficient and competent to impose upon them a liability to pay for its use, according to the terms of the notice, if subsequently used, had the right to demand any compensation been acknowledged, or recognized and not denied; for in such case the law will presume that they used it upon the terms imposed, and raise the corresponding duty, and imply the contract accordingly. But in the present case, all such implication is precluded by the fact that the defendants denied any right to demand compensation for the use, and used it in defiance of the plaintiff's claim, and under claim of right in

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themselves; and they can not therefore be presumed to have acceded to the terms imposed.

If, then, any duty can be implied, it is to pay what such use is reasonably worth. Now, as already remarked, the plaintiff had a right to require payment, as a condition to the use of the canal; and had he required such, but fixed no price, and the defendants had used it with knowledge of such terms, and under the condition, beyond doubt the duty would be raised to pay what such use would be reasonably worth; but if the effect of a denial of the right to demand compensation, and a use of the canal in contravention of the claims asserted by the plaintiff, will prevent the implication of a duty to pay a specific rate imposed, how can it be said that it will still raise the duty of paying according to its worth? If the denial goes to anything, it must go to the whole claim of the plaintiff for compensation, and will preclude every presumption of the recognition of a duty upon which a contract can be implied; while, on the other hand, if the law will imply a duty, it will imply one co-extensive with the terms imposed. It goes to the whole remedy, whether for a specific price, or for reasonable compensation. But the law implies the duty only where the right of dominion over the subject matter is conceded, or not questioned; and never where the use is under an adverse claim of right, or a denial of that asserted. In such case, the entry, being adverse to the plaintiff, is a naked trespass, upon which no duty to compensate, which can be converted into a contract, arises; for such duty can only be implied where the conventional or implied relation of promiser and promisee exists, or where the duty springs from some change of relation after the wrongful act, as in the case of the conversion into money of property wrongfully taken, and the like. If he could be held to be a promiser in such case, under any implication of law, no valid reason can be given why an intruder, under a claim of right, may not be so held in all cases. The con-

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clusion can not be avoided that in such a case he can not be regarded in any other light than as a trespasser; for he not only enters upon the property in opposition to the notice of the owner forbidding it, except upon the terms of recognizing and responding to his right to require compensation, but also under the assertion of a claim of right inconsistent with and adverse to that made by the owner.

The subject of tolls, and the right of the plaintiff to collect them, was very elaborately discussed in this case, but, under the views we have taken, it does not become necessary for us to consider, it.

From the views already expressed, it follows that the defendants in this case are mere naked trespassers, and no assumpsit can be implied from their use of the canal; and this view renders it unnecessary to consider any other of the questions raised.

The judgment is affirmed.

CAMPBELL J. concurred. CHRISTIANCY J. also concurred in the result.

MANNING J.:

I think trespass, and not assumpsit, is the proper action. Was the stream navigable before the canal was dug? The defense is that it was, and that defendants, in common with other citizens of the state, had a right to use it to float their logs. The law will not imply a promise in such circumstances, for there is nothing to base a promise upon, as defendants received no benefit from the use of the canal, if their defense be true.

Assumpsit for money had and received is an equitable action, and may be brought when one person has money in his hands that in equity and good conscience belongs to another. But that is not this action, which is assumpsit to recover compensation for the use of plaintiff's canal, and, like assumpsit for goods sold and delivered, or for

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work and labor, will lie only on a promise, express or implied.

When plaintiff's goods have been wrongfully taken, it is said he may waive the trespass and bring assumpsit for goods sold and delivered. This may be so where defendant lays no claim to the goods, and the trespass is wholly wanton on his part. But when he claims them as his own, or claims a right to the possession of them, and justifies the taking on that ground, trespass and not assumpsit is the proper remedy. In a case of pure trespass, by which I mean one committed without color of right to the property taken, the court may well say to defendant, You shall not be permitted to defeat the action by showing you took the goods without intending to pay for them, or with an intention to do a wrong with which the plaintiff, by putting a more charitable construction on your conduct, has not thought proper to charge you. This, I think, is all that is meant by waiving the trespass and suing for goods sold and delivered. There is no objection to such a course when the trespass is wholly separate from the right of property; but when it is mixed up with the right of property, and the question of trespass or no trespass depends on that right, and must stand or fall with it, the trespass can not be waived, because none is admitted; and the law will not imply a promise to pay, as defendant took the goods in his own right.

The case at bar does not involve the right to personal property, but the right of the public to an easement over plaintiff's land. If the stream was navigable when the canal was dug, the public still has a right to use it; otherwise not, unless it it has since been dedicated to the public.

It was urged on the argument, as a reason why the court should sustain the present action, that in trespass the plaintiff could recover nominal damages only. I do not think so. In trespass for breaking and entering his close,

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he may allege and prove the use of the canal by defendants as special damages.

Judgment affirmed.

John Hotchin and others v. Henry A. Kent and others.

A partner binds his firm only on the theory of an implied agency for the purposes of the mutual adventure; and the agency does not extend beyond what may fairly be regarded as coming within its reach.

The articles of a joint stock mercantile association prohibited the officers entrusted with the conduct of its business from making purchases on credit. They, notwithstanding, made a purchase on credit, first giving the seller a copy of the articles.—*Held*, that the association were not liable for the purchase, unless subsequently ratified by them.

The officers themselves are not competent to ratify their unauthorized act.

The receipt of the goods by the association, or even the sale of them in the course of their business, would not of itself amount to a ratification, since the members cannot be supposed to know that the purchase has been made in violation of their articles.

Heard October 4th. Decided October 18th.

Error to St. Joseph Circuit. The case is sufficiently stated in the opinion.

W. Saivers, and *C. Upson*, for plaintiffs in error:

The acts of a partner in violation of his duty to the firm, do not bind the firm where the other party to the transaction is cognizant of and co-operates in such breach of duty:—*Story on Agency*, §125; *Story on Part.* §117, 123; 7 *T. R.* 207; 2 *Mich.* 102; 2 *B. & Ald.* 673; 4 *Johns.* 278; 1 *Lloyd & Wels.* 6; 1 *Campb.* 403; 10 *East*, 264; 3 *Conn.* 124; 1 *Stark.* 164; 5 *Watts & S.* 564.

The fact that the property came to the possession of the association is not of itself sufficient to make them liable:—1 *Sim.* 376; 1 *Mo.* 121; 17 *Wend.* 47. There should be proof that the association voluntarily enjoyed the benefit of the purchase, with full knowledge of the circumstances, with a manifest intention of recognizing the purchase as binding upon them.

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H. H. Riley, for defendants in error.

CAMPBELL J.:

The defendants below (the plaintiffs in error) were sued as partners, for goods sold on credit, which were purchased by William B. May, Secretary of the "White Pigeon Farmers and Mechanics Mercantile Association" of which they were members and partners. May, as Secretary, had charge of the store belonging to the defendants, and of buying and selling goods. The Association was a voluntary joint stock company, for mercantile purposes, intended chiefly to secure to the members the privilege of buying goods at a moderate advance on cost prices, besides giving them any profits accruing beyond expenses. It was one of the articles of association that no goods should be bought on credit. The business was to be conducted through the usual officers of joint stock companies.

The defendants in error (the plaintiffs below) sold goods to May, after receiving from him a written copy of the articles of association, containing the prohibition against credit purchases. There was no evidence of ratification by any of the defendants beyond what is claimed to have been legally deducible from the forwarding of the goods through the channel pointed out by May, and some evidence that packages were seen in the store. The court held that delivery to the forwarding company in New York, by May's orders, was a sufficient delivery to the defendants to bind them all, and to hold them for goods bought on credit.

While, in an ordinary commercial partnership, any act of one of the partners, with innocent parties, within the scope of the partnership business, will usually bind the firm, yet any contract made without the scope of the business, with a person who knows or is bound to know that it is beyond that scope, can never be held binding on the firm of its own force, or without some express or

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implied adoption. A promissory note, for example, given for a private debt by one partner, can not, in the hands of the original holder, be enforced against the partnership. And the principle applies to any similar excess of authority. A partner binds his firm only on the theory of an implied agency for the purposes of the mutual adventure, and the agency does not extend beyond what may fairly be regarded as coming within its reach.

It is unnecessary, in the case before us, to examine into the question whether a person dealing with the officers of a joint stock company is not bound to inquire into the extent of their authority; because, in the case before us, there is no question but that there was actual knowledge brought home to the creditors. To hold that, with this knowledge, they could lawfully bind the Association by a bargain made in deliberate violation of their articles, would be in conflict with the plainest principles of law, as well as of common honesty. Such a bargain is a fraud, and its perpetrators can not ask a court to enforce it.

It is claimed, however, that the reception of the goods by May is the act of the plaintiffs in error, and amounts to a ratification. We do not perceive on what principle an unauthorized agent can ratify and make valid his own void act.

Under the charge of the court, it was not necessary for the implied ratification that the goods should have been received at the store. But there would be nothing in such reception, and the disposition of the goods in the usual way of business, to bind the members of the association. By the articles, the business was to be managed by May, and the other officers; and the members at large can not be supposed to know what perhaps might be presumable among ordinary partners. They might fairly infer that their agent had honestly paid their money for the goods in store. It would be a most violent presumption to infer an approval of an unauthorized purchase, because the stockholders ab-

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stained from interfering in the management of business which they placed in the hands of agents for the very purpose of avoiding the necessity of personal management. Legal presumptions must be reasonable; and an approval can only be presumed where the parties from whose conduct it is inferred must be supposed, in all probability either to know, or at least to be in a position where they are careless if they do not know, the acts to which their assent will be assumed in the absence of dissent. No such presumption could arise here. The charges of the court, and its refusals to charge, on the subject of the authority of May, and as to what was necessary to bind the association, were erroneous, and had a manifest tendency to mislead the jury.

The judgment must be reversed, with costs, and a new trial granted.

The other Justices concurred.

George L. Smalley v. John D. Masten.

The statute exempting from execution, to the amount of $250, the tools, implements, &c., to enable a person to carry on the business in which he is wholly or principally engaged, is not to be construed with reference to the productiveness or profit of one kind of business over another, where two or more occupations are followed at the same time, but with reference to the occupation or business on which the party chiefly relies for a livelihood, and which engrosses the most of his time and attention, not for a day, or week, or month, but through the year.

Where, therefore, a suit was brought for property claimed as exempt under this statute, and it appeared that the plaintiff was engaged in two occupations—*Held* erroneous for the court to permit the plaintiff to call witnesses to prove which of his two occupations would be likely to bring him in the most.

Heard October 5th. Decided October 18th.

Error to Jackson Circuit.

Masten brought replevin against Smalley, to recover a span of horses and wagon, which the latter, as Sheriff of Jackson county, had levied upon by virtue of an execu-

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tion against Masten, who claimed the same as exempt, to enable him to carry on the business of farming. On the trial, it was shown that plaintiff carried on a farm, and was also engaged in business as a tailor; and the following question was put by plaintiff's counsel to one of his witnesses: "Which of these occupations would be likely to bring him [plaintiff] in the most?" The defendant objected to the question, but the court overruled the objection, and the witness answered, he supposed farming would, from what he knew.

The charge to the jury is sufficiently stated in the opinion. Masten had judgment in the court below.

M. McGee, for plaintiff in error.

Blair & Gibson, for defendant in error.

MANNING J.:

"The tools, implements, materials, stock, apparatus, team, vehicle, horses, harness, or other things to enable any person to carry on the profession, trade, occupation or business, in which he is wholly or *principally engaged*, not exceeding in value two hundred and fifty dollars" (*Comp. L.* § 4465), are exempt from levy and sale on execution. The words "*principally engaged*," are not to to be construed with reference to the productiveness or profit of one kind of business over another, where two or more occupations are followed at the same time, but with reference to the occupation or business on which the party chiefly relies for a livelihood, and that engrosses the most of his time and attention; not for a day, or week, or month, but through the year. We therefore think the court erred in allowing the plaintiff below, who is the defendant in error, to prove which of his two occupations, tailoring or farming, would be likely to bring him in the most. A new business, embarked in as an experiment

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merely, might temporarily produce more, and require more personal attention, than the old, and yet the latter be one's principal occupation, because most relied on or looked to for a livelihood, and the one that would be held on to if compelled to abandon either.

The judge was requested to charge that, if the plaintiff gave his principal time and attention to the business of tailoring, the property replevied would not be exempt. This he refused, but did charge the jury that it was proper for them to consider the amount or extent of the different kinds of business in which he was engaged, as well as his personal labor: that personal labor was not a positive or absolute test of the business in which he was principally engaged, but was a circumstance to be left to them for their consideration. There was nothing wrong in this. Still, the jury may have been influenced more or less in rendering the verdict they did by the evidence already referred to. They probably were.

Judgment is reversed, and new trial ordered.

The other Justices concurred.

James G. La Roe, Administrator, &c., v. Garrett Freeland.

Plaintiff made a parol contract with L. to make certain improvements on lands of the latter, for which he was to be paid in case L. returned from California where he was going, but if L. did not return plaintiff was to have the land. L. died in California, and plaintiff presented a claim for the improvements against the estate.—*Held*, that he could not recover, but must look to the land as his pay.

Where an appeal is taken to the Circuit Court from the action of commissioners appointed to audit claims against the estate of a deceased person, the Circuit Court should not render judgment in the common law form, but simply allow or disallow the claim.

Heard October 6th. Decided October 13th.

Error to Saginaw Circuit.

Freeland presented to the commissioners appointed by

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the Probate Court to pass upon demands against the estate of Abram LaRoe, a claim for the building of a house and barn, and for certain other improvements, on land belonging to deceased; and this claim having been allowed by the Commissioners, the administrator appealed. A trial was had in the Circuit Court without a jury, and the Circuit Judge found the following facts.

"That before Abram LaRoe went to California, in 1854, plaintiff entered into a parol agreement with him, by which plaintiff was to have the use and occupation of the S. W. pt. of S. W. fr. ¼ of Sec. 16, T. 13 N. of R. 3 E. during LaRoe's absence in California, which would be at least three years, and perhaps longer; for which plaintiff was to pay taxes, and take care of the land.

"That plaintiff was to make other improvements than what was already chopped, if he saw fit, and that on LaRoe's return he was to pay for them, and if he did not return, plaintiff was to have the land: that Abram LaRoe has not returned, and that plaintiff has been in possession to this time. That plaintiff built a house, now worth about $60, and a barn, now worth about $125, and cleared about eight acres, worth about $15 per acre; in all $305. That plaintiff paid the taxes, kept up the fences, and occupied the land. That James G. LaRoe was appointed administrator of the estate of Abram LaRoe deceased, June, 1857, and plaintiff had a conversation a year after the appointment of administrator, about the occupancy of the land, in which Freeland said that if LaRoe would let him stay on another year, he would certainly clear it off. A little corner, perhaps an acre and a half, of wet ground, is not cleared.

"That plaintiff cut and sold about 4000 saw logs, worth $3 a thousand, and about a hundred spiles, 25 feet long, worth a cent a foot, from other land adjoining belonging to LaRoe; in all $37.

"The court finds the following conclusions of law:

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"That the contract is not an agreement which by its terms is not to be performed within one year from the making thereof.

"That the agreement is a two-fold contract, and has two parts, independent of each other. 1st. A contract for the use and occupation of the land, or an executed parol lease, upon which the parties have acted, and which they have recognized. 2d. A contract for making improvements upon the land. The contract for the use and occupation of the land, if within the statute of frauds when made, being executed, the statute furnishes no defense. The contract for improvements not being by its terms not to be performed within one year, is not within the statute.

"The terms of the lease being the payment of the taxes, defendant can not recover for the yearly value of its use."

The Circuit Court thereupon rendered judgment in favor of plaintiff, for $268, and costs.

Sutherland & Miller, for plaintiff in error.

W. H. Sweet, for defendant in error.

CAMPBELL J.:

The claim in controversy against the estate of Abram LaRoe, is for money laid out and services rendered under a contract made with him in his lifetime. By the terms of the contract, as found by the court, Freeland was to be paid in case LaRoe returned from California, but if he should not return, Freeland was to have the land. As LaRoe did not return, there was no breach of the contract, unless he had put it out of his own power to fulfil by some other disposition of the property. As this is not shown, Freeland is bound to look to the land as his pay, and not to set up a personal claim against the estate. Whether the Statute of Frauds will apply to prevent his obtaining a specific performance, is a question which can be more properly decided

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when he shall present his case with its circumstances in a court of equity.

The judgment of the Circuit Court, allowing the claim, must be reversed, with costs, and a judgment of disallowance entered upon the finding.

We take occasion to suggest that, under our statutes, the more correct form of judgment in the Circuit Court on appeal from the allowance of a claim, would be an adjudication of the allowance of the claim at a certain sum, or a disallowance, and not a judgment against the administrator in the common law form. The statute regards the action of the court as analogous to that of the commissioners:—*Comp. L. p.* 891, § 2941. A formal judgment may not be erroneous in law, but is liable to misapprehension, inasmuch as it can not be literally enforced according to its terms.

The other Justices concurred.

Judgment reversed.

Hiram S. Pennoyer v. The City of Saginaw.

A municipal corporation which creates a private nuisance is *prima facie* liable for its continuance.

Heard October 6th. Decided October 13th.

Error to Saginaw Circuit. The case is sufficiently stated in the opinion.

Sutherland & Miller, for plaintiff in error.

Moore & Gaylord, for defendants in error.

Manning J.:

This is an action against the city of Saginaw, for maintaining, keeping up and continuing in said city, since the first day of January, 1859, certain ditches, whereby the sur-

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plus surface water of the city is thrown upon the land of the plaintiff, to his great injury. On the trial, after introducing evidence to show his title to the land on 1st January, 1859, and that he was in possession thereof, the existence of the ditches, and the injury done to the land, he offered in evidence the record of the proceedings of the common council of the city, in 1858, to prove the making of contracts and employment of men by the city to dig the ditch by which the water was turned on his land. It was objected to, and ruled out by the court, but for what reason does not appear from the bill of exceptions. If on the ground that it was of proceedings anterior to the plaintiff's title, and his possession of the land — as stated in the brief submitted by defendant's counsel — it is only necessary to say that the city, by creating the nuisance, which the evidence offered tended to prove, is prima facie liable for its continuance.

Judgment reversed, with costs, and a new trial granted.

The other Justices concurred.

Daniel Day and another v. Eliza V. Watson.

Where a landlord, during the continuance of a lease, without the consent of the tenant enters upon the demised premises, which have been vacated by the tenant, and the entry is followed by a continuous possession inconsistent with the possessory right assured to the tenant by the lease, such possession amounts to an eviction, and precludes the recovery of rent while it continues

And this is so whether the entry be for condition broken or not. If for condition broken, it signifies an intention to terminate the lease entirely; while if the landlord regard the lease as still continuing, the right to rent is suspended during the occupancy.

Heard October 9th. Decided October 18th.

Error to Wayne Circuit. The case is sufficiently stated in the opinion.

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J. E. Bigelow, for plaintiffs in error.

L. Bishop, for defendant in error.

CAMPBELL J.:

It appears in this case, that the plaintiffs in error, being in arrears for rent, and having left the demised premises, the defendant in error gave the key of the house to one Harvey Burns, who was employed to take care of the place and occupy it until defendant in error could rent it. She brings an action for rent for a period including the time when Burns was in possession.

There is no proof in the case from which an inference could be legitimately drawn, that the entry of defendant in error was by consent of her tenants, or under any arrangement with them. This being so, and the entry being followed by a continuous possession, which was inconsistent with the possessory title assured to the tenants under the lease, that possession amounts very clearly to an eviction:—*Lewis v. Payn*, 4 *Wend.* 423; *Dyett v. Pendleton*, 8 *Cow.* 72; *Lawrence v. French*, 25 *Wend.* 443. A tortious entry not followed by possession stands on a different footing, and is a mere trespass. *Ibid.*

So far as the present case is concerned, it makes no difference whether the action of the defendant in error be considered as an entry on condition broken or otherwise. If she be regarded as entering on condition broken, that would signify an intention to terminate the lease entirely. If she regarded the lease as still continuing, the right to rent was supended during the occupancy:— *Taylor on L. & T.* §§ 378, 380. In the absence of any evidence showing an understanding with the tenants, she had no right to reassume possession, whether the premises were vacant or not, if she designed to regard the lease as continuing. The plaintiffs in error had the right, therefore, to have the instructions given which they asked of the court be-

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low, and the refusal of the court to give them was erroneous.

The judgment must be reversed, with costs, and a new trial granted.

The other Justices concurred.

James G. LaRoe v. Otto Roeser.

A conviction for a criminal offense was had before a justice of the peace, and a fine imposed, with imprisonment for *ten days* in default of payment. Defendants refusing to pay the fine, the justice issued his warrant of commitment, reciting judgment for the fine, and that, in default of payment, defendants be imprisoned until the fine was paid, or *until discharged by due course of law;* and directing imprisonment accordingly. — *Held*, that the warrant was void, and the justice liable for the arrest under it.

The warrant, not being supported by the judgment, was a clear excess of jurisdiction; and that in the performance of a ministerial rather than a judicial act.

Heard October 6th. Decided October 13th.

Error to Saginaw Circuit.

Action by LaRoe, against Roeser, in trespass for causing plaintiff to be arrested and imprisoned in Saginaw county jail. Defendant, who is a justice of the peace, justified under the following proceedings:

June 14, 1859, Garrett Freeland made complaint against plaintiff, before defendant, as follows:

"State of Michigan, county of Saginaw ss: Garrett Freeland, of Tittabawassee in said county, on his oath complains, that on the 13th day of June, 1859, James LaRoe, Jefferson Chapman, and Joe Hackney, without his, the said Garrett Freeland's consent, or any other authority, forcibly entered his house on the premises occupied by him, on the south west corner of section sixteen in said township, and on his command to leave and quit the said house, refused to do so, and did not go, and the said James LaRoe drew a pistol from his pocket, and

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pointed it towards this complainant, threatening to shoot him, the said complainant; and the said Jefferson Chapman raised a club against the said complainant, saying that he would fix him, and knock his old brains out; against the peace of the said People, and against the form of the statute in such case made and provided; for which assault the said Garrett Freeland prays that the said James La Roe, Jefferson Chapman, and Joe Hackney, may be apprehended to answer to his complaint, and further dealt with relative to the same as law and justice may require.

GARRETT FREELAND.

Sworn to and subscribed before me, this 14th day of June, 1859. OTTO ROESER,

Justice of the Peace."

On this complaint, defendant issued a warrant as follows:

"State of Michigan, county of Saginaw: To any constable in said county: In the name of the People of the State of Michigan, you are hereby commanded forthwith to arrest James LaRoe, Jefferson Chapman, and Joe Hackney, and bring them before me, Otto Roeser, one of the justices of the peace of said county, or some other justice of said county, to answer to the complaint of Garrett Freeland, of said county, made this day on oath, before me, against the said James G. LaRoe, Jefferson Chapman, and Joe Hackney, that they the said James G. LaRoe, Jefferson Chapman and Joe Hackney, on the 13th day of June, 1859, without his, the said Garrett Freeland's consent, or any other authority, forcibly entered his house on the premises occupied by him the said complainant, on the south west corner of section sixteen in said township, and on his command to leave and quit the said house, refused to do so, and did not go out, and the said James LaRoe drew a pistol from his breast pocket, and pointed it towards the said Garrett Freeland, threatening to shoot him, the said complainant; and the said Jefferson Chapman raised a club

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against him the said complainant, saying that he would fix him, and knock his old brains out; for which assault the said Garrett Freeland prays that the said James G. LaRoe, Jefferson Chapman and Joe Hackney, may be apprehended and be dealt with according to law. It appearing to me that the said offense has been committed. Given under my hand and seal, at Tittabawassee in said county, this 14th day of June, 1859.

Otto Roeser, *Justice of the Peace.* [seal.]"

The defendants named in this warrant being arrested and brought before the said justice, a trial was had, and the justice, as appears by his docket, "adjudged that James G. LaRoe and Jefferson Chapman pay a fine of five dollars each, within an hour, or be imprisoned in the county jail for the term of ten days each, or till otherwise discharged according to law. Defendants refusing to pay said fine, commitment issued to Benjamin Freeland, constable."

The following is a copy of the commitment:

"State of Michigan, county of Saginaw, ss: To the Sheriff, or any constable of said county, and to the keeper of the common jail of said county: Whereas, at a court held this day, at the township of Tittabawassee in said county, before me, Otto Roeser, one of the justices of the peace of said county, James G. LaRoe and Jefferson Chapman were each convicted of having, on the 13th day of June, 1859, at the township of Tittabawassee, in said county, did feloniously assault Garrett Freeland of said county and township, and I, the said justice, did adjudge and determine that the said James G. LaRoe and Jefferson Chapman should pay a fine of five dollars each, or be imprisoned in the jail of said county until they shall have paid said fine, or until they be discharged by the due course of law.

"These are therefore, in the name of the People of the State of Michigan, to command you, the said constable,

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forthwith to convey and deliver the said James G. LaRoe, and the said Jefferson Chapman, into the custody of the keeper of said jail — the said James G. LaRoe and Jefferson Chapman having refused to pay said fine — and you the said keeper, in the name of said People, are hereby required to receive the said James G. LaRoe and Jefferson Chapman into your custody, in said jail, and keep them there until they have paid the said fine of five dollars each, respectively, or until they shall be discharged by due course of law.

"Given under my hand and seal, at the township of Tittabawassee in said county, the 16th day of June, 1859.

Otto Roeser, *Justice of the Peace*, [seal.]"

The objections taken to these proceedings were, that the warrant of arrest was void, because it did not charge or recite the commission of any offense in Saginaw county: that the proceedings as entered on the docket did not show that defendants were found guilty, and the judgment was void; and that the warrant of commitment was void, because of the variance between it and the judgment, and because also it purported to be based on a judgment which would itself be void, because adjudging imprisonment for an indefinite period.

The Circuit Court held the warrant of arrest sufficient, and that the subsequent proceedings, though imperfect and voidable, did not subject the justice to liability.

Sutherland & Miller, for plaintiff in error.

W. H. Sweet, for defendant in error.

Christiancy J.:

It is unnecessary to determine in this case, whether the warrant of arrest was void, though we are inclined to the opinion that it was not. The complaint was sufficient; and the warrant was to answer "*to the complaint of Garrett Freeland, of said county*," and the offense is charged to

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have been committed in the house of complainant (and occupied by him). This, together with the venue in the margin, might, perhaps, be considered equivalent to charging the offense as committed in said county. But we give no definite opinion upon this point, as the case does not call for it.

Nor is it necessary to determine whether the judgment of the justice was void, or only voidable; since, if it was in all respects valid, it did not authorize the warrant of commitment. The judgment (or what is claimed to be a judgment) was that the defendant pay a fine of five dollars within one hour, or be imprisoned in the county jail *for the term of ten days*, or till otherwise discharged according to law.

The commitment recites a judgment for the payment of five dollars fine, or imprisonment until the fine should be paid, or he be discharged by due course of law: and the command for the imprisonment is in accordance with this recital. The judgment proved was for imprisonment for a *definite time*, ten days, or till otherwise discharged, &c. The commitment purports to be founded on a judgment of imprisonment for an indefinite period of time, and commands the imprisonment for an indefinite time.

The period of imprisonment, under the judgment proved, could not have exceeded ten days. The imprisonment authorized by the commitment would be limited (if at all) by the period for which the justice had jurisdiction to punish for the offense, which, by the statute, is three months: — *Comp. L.* § 3965.

The commitment was therefore void. This was not a mere error of judgment in the performance of his judicial duties, such as an erroneous opinion or judgment on the trial of a cause of which he had jurisdiction. It was a clear excess of jurisdiction, and that in the performance of a ministerial rather than a judicial act.

We have been very reluctantly brought to this conclu-

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sion, as there does not appear, from the case as presented, any ground for suspecting that the defendant acted corruptly, or maliciously. From the facts disclosed, we should infer the contrary; that he acted with entire good faith; and that he erred only through mistake or ignorance. The imprisonment seems to have been very slight, and, for aught that appears, well merited. But there may have been, or believed to be, something in the case which the record fails to show; and we would not lightly attribute to respectable counsel a willingness to aid in the prosecution of such a suit, where the expense of the litigation must far exceed any damages he could expect to recover, unless it was believed that a corrupt or malicious motive could be shown.

Actions of this kind, where the officer has acted in good faith, ought not to be encouraged; for though in strict law there may be, as in this case, a legal injury sufficient to constitute a cause of action, and to entitle the plaintiff to any actual damages he may have sustained by the imprisonment, however much he may have morally deserved it; and though the court can not protect the defendant from that liability without overturning well settled legal rules, yet, upon this hypothesis of the case, the plaintiff is indebted for the support of his action to the imperfection of the law, its inability to deny the action without the sacrifice of that certainty in its rules which is essential to its general utility. It is quite apparent that "the utmost strictness of the law, in such cases, is not justice."

The judgment must be reversed, and a new trial ordered.

The other Justices concurred.

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Henry K. Sanger and others v. Wesley Truesdail and others.

A plea in bar was interposed in Chancery, and the Circuit Judge, instead of passing upon it, reserved the question of its sufficiency for the opinion of the Supreme Court.—*Held*, that the Supreme Court had no jurisdiction of the question; the Constitution having conferred upon it appellate jurisdiction only, except in certain specified cases, of which this was not one.

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INDEX TO CASES REPORTED.

ABATEMENT.

1. A plea in abatement must have the highest degree of certainty and precision. Every allegation necessary to make out the case covered by it, must be distinctly, and not inferentially, set forth.— *Belden v. Laing*, 500.

2. In an action of replevin a plea in abatement was interposed, setting up the pendency of a prior suit in replevin, by virtue of the writ in which the property in controversy was taken and held by one of the defendants, who was sheriff of the county. The plea did not allege that any affidavit was attached to the writ in the first suit, nor that the writ commanded the sheriff to take the property in controversy. *Held*, that the plea was insufficient on both grounds. — *Ibid.*

3. In an action of replevin under the statute, anything going to show that the plaintiff had no right to the possession when he commenced his suit, is a complete bar to the action. As that the defendant lawfully held the property, as against the plaintiff, by virtue of a prior writ of replevin. — *Ibid.*

4. In replevin by one plaintiff against three defendants, plea in abatement was interposed, of a prior action in replevin, by two of the defendants against the plaintiff and another, by virtue of which the other defendant, as sheriff, took and detained the property. *Held*, that the issues in the two cases were not identical, as the possessory right of the sheriff under his writ, if valid, could not be impaired or affected, although the plaintiff in the present suit might show a perfect title as against the other defendants, the plaintiffs in the first suit. — *Ibid.*

ACCEPTANCE.

See TAX COLLECTOR, 1.

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ACCOUNT BOOKS.

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See ESTATES OF DECEASED PERSONS, 2.

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See CONTRACT; LAND CONTRACT; SPECIFIC PERFORMANCE.

AMENDMENT.

See PRACTICE IN SUPREME COURT, 2, 3, 4, 5, 6.

APPEAL IN CHANCERY.

1. Where an appeal is taken in Chancery, in a case in which the witnesses were examined in open court, the proper course for the party desiring the testimony to be certified to the Supreme Court, under the statute, is to make a case setting it forth, present it to the Circuit Judge, and procure his order, fixing the time and place when and where it shall be settled, and for notice to the

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opposite party that he may attend and propose amendments; or, instead thereof, take other equivalent proceedings. — *Wright v. Dudley*, 74.

2. Where no proceedings are taken for the settling of such a case, but the party appellant, without notice to the opposite party, procures and files with the appeal papers a certified copy of the Judge's minutes of the evidence taken on the trial, such copy can not be treated as a case made under the statute, or considered in this court on the hearing. — *Ibid.*

3. Either of the parties has the right to procure such a case to be settled; and, if the appeal is regularly taken, and neither party take steps to have a case made and settled, the cause will stand for hearing without the testimony, and it will then devolve upon the appellant to show that the decree is not warranted by the pleadings — the presumption being that there was evidence below to authorize it. — *Ibid.*

4. The statute allowing three months after trial for the making of such a case, will be construed to allow three months from the time decree is made. — *Ibid.*

5. A copy of the bond, given on appeal in chancery, should be sent up by the Register with the record. It is not sufficient that the Register certifies that an appeal bond was duly approved and filed. — *Maynard v. Hoskins*, 81.

6. This court will not dismiss an appeal duly taken, for a failure of the Register to send up a copy of the appeal bond; but a further return will be ordered for the purpose of bringing it up. *Ibid.*

7. A return to an appeal in chancery should include full copies of all the proceedings in the case; so that the transcript shall present everything which appears in the court below. — *Wright v. Dudley*, 115.

8. An indorsement upon an appeal bond in Chancery, signed by the proper officer, in the following words: — "I approve of this bond, both in form and substance," will be held an approval both of the sureties and of the penal sum; and is sufficient. — *Maynard v. Hoskins*, 260.

9. On a motion to dismiss the appeal for want of a sufficient bond, affidavits will not be received to enlarge or restrict the force of such an endorsement. — *Ibid.*

APPEAL IN PROBATE CASES.

See ESTATES OF DECEASED PERSONS.

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ASSESSMENTS.

See CONSTITUTIONAL LAW, 1, 2, 3, 4.

ASSESSMENT OF DAMAGES.

See PRACTICE IN CIRCUIT COURTS, 1, 2, 3, 4.

ASSIGNMENT.

1. Where an assignment for the benefit of creditors is attacked as fraudulent, it is competent for the creditors attacking it to prove the declarations of the assignor, made after the assignment was signed and delivered, but before the schedules were made out and attached, and while the assignor was engaged in preparing them. — *Wyckoff v. Carr*, 44.

2. The cases of *Oliver v. Eaton*, 7 Mich. 108, and *Bagg v. Jerome*, 7 Mich. 145, approved. — *Ibid.*

ASSIGNOR AND ASSIGNEE.

See CHOSES IN ACTION; NOTICE.

ASSUMPSIT.

1. As a general rule, when money has been received by a defendant under any state of facts which would, in a court of equity, entitle the plaintiff to a decree for the money when that is the specific relief sought, the same state of facts will entitle him to recover the money in an action of assumpsit for money had and received. — *Moore v. Mandlebaum*, 483.

2. The general nature of the action of assumpsit considered. — *Ward v. Warner*, 508.

3. A canal through a marsh in which a stream is lost, cut by private individuals through the land of one of them, for the purpose of affording floatage for timber and lumber through the same in connection with the stream — there being no evidence that the waters of the stream ever ran along its line, or that it was the improvement of an existing water channel — is a *private* way, and the public are not entitled to use it, unless it be dedicated to their use. — *Ibid.*

4. The owner of the land on which such canal was dug, and who appeared to have incurred the major part of the expense of mak-

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ing it, gave notice to other individuals who had contributed to its repair, that they must compensate him for its use at a rate which he specified in his notice; and on their refusal and continuing its use under a claim of right to do so, brought action in assumpsit to recover compensation for the use. — *Held*, that the action could not be maintained. — *I bid.*

5. The law will not imply a promise to make compensation for the use of the canal before the notice was given, and while it was permitted by the plaintiff without objection, and without demand of compensation. — *I bid.*

6. Nor will the law imply such a promise after the notice, since any implication of a promise is precluded by the denial by defendants of all right to compensation, and the assertion of an adverse right in themselves. The adverse entry, if the claim of right is unfounded, is a naked trespass, upon which no duty to compensate arises which can be converted into a contract.— *I bid.*

See PRINCIPAL AND AGENT.

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BAIL, EXONERATION OF.

1. A Circuit Judge has no jurisdiction of proceedings for the commitment of a defendant, in exoneration of special bail, unless copies of the bail piece are presented to him, as the basis of his action, as required by the statute. It is not sufficient that copies of the recognizance of special bail are presented, instead of the bail piece. — *Elliott v. Dudley*, 62.

BANKING, UNLAWFUL.

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BREACH OF PROMISE TO MARRY.

1. In an action for breach of promise to marry, it is not necessary for plaintiff to prove that defendant was of full age when the promise was made. — *Simmons v. Simmons*, 318.

2. In such an action it is not error to allow proof that defendant borrowed money of plaintiff, and renewed his notes therefor immediately before marrying another; as it is important for the jury to understand as fully as possible the mutual conduct of the parties during the existence of the contract, as well as the causes and circumstances attending the breaking off of the engagement, —*Ibid.*

3. Proof of the frequent intermarriage of the ancestors of the parties, who are cousins, and of the evil tendency of the marriage of relations in producing deformed or sickly and imbecile children, is incompetent — the contract of marriage not having been broken on any such ground. —*Ibid.*

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Bagg v. Jerome, 7 Mich. 145; *cited*, 48.
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CASES RESERVED.

1. A plea in bar was interposed in Chancery, and the Circuit Judge, instead of passing upon it, reserved the question of its sufficiency for the opinion of the Supreme Court. — *Held*, that the Supreme Court had no jurisdiction of the question, the Constitution having conferred upon it appellate jurisdiction only, except in certain special cases, of which this was not one. — *Sanger v. Truesdail*, 543.

See PRACTICE IN SUPREME COURT, 2; RECORDER OF DETROIT. 1.

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CHANCERY, COURT OF.

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CHATTEL MORTGAGE.

See MORTGAGE OF CHATTELS.

CHOSES IN ACTION.

1. The assignee of a chose in action takes it subject to all equities existing between the parties to the instrument, but not to any latent equities which some third person may have against the debtor or party bound by the instrument. The assignee of a mortgage, therefore, who has purchased the same in good faith, does not take it subject to any equities between the mortgagor and his grantor, growing out of the fraud of the mortgagor in procuring the title to the land. — *Bloomer v. Henderson*, 395.

2. One who has given a mortgage to be sold for a fraudulent purpose, can not set up the fraud as a defense to the mortgage in the hands of a *bona fide* purchaser. — *Ibid.*

CIRCUIT COURT COMMISSIONERS.

See CONSTITUTIONAL LAW, 7.

CIRCUIT JUDGE.

See BAIL, EXONERATION OF.

CITY OF DETROIT.

1. The owner of an undivided interest in lands in the City of Detroit, may redeem such interest from a sale made of the whole land for taxes assessed thereon for city purposes, since the Charter of 1857, by paying a proportionate amount of the whole tax. — *People v. Treasurer of Detroit*, 14.

See CONSTITUTIONAL LAW, 1 to 4; DETROIT WATER COMMISSIONERS; RECORDER OF DETROIT.

COMMITMENT.

1. A conviction for a criminal offense was had before a justice of the peace, and a fine imposed, with imprisonment for *ten days* in

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default of payment. Defendants refusing to pay the fine, the justice issued his warrant of commitment, reciting judgment for the fine, and that in default of payment, defendants be imprisoned until the fine was paid, or *until discharged by due course of law;* and directing imprisonment accordingly. — *Held*, that the warrant was void, and the justice liable for the arrest under it. — *LaRoe v. Roeser*, 537.

2. The warrant, not being supported by the judgment, was a clear excess of jurisdiction; and that in the performance of a ministerial rather than a judicial act. — *Ibid.*

COMMON LAW.

1. The common law is in force in Michigan, and questions of property, not clearly excepted from it, must be determined by the common law, modified only by such circumstances as render it inapplicable to our local affairs. — *Lorman v. Benson*, 18.

COMPROMISE OF DEBTS.

1. Where a party receives a compromise note from his debtor, with collateral security, agreeing that, if paid when due, the original debt shall be discharged, otherwise of force; and after the compromise note comes due and is unpaid, sells and transfers the same with the collaterals and the original debt, he thereby confirms the compromise; and the purchaser can not claim the amount of the original debt on the ground of forfeiture of the compromise agreement before he purchased. — *Hale v. Holmes*, 37.

2. And, where the collateral security in such case was the note of the purchaser, which became due before the compromise note, and was relied upon to pay the compromise note, — *Held*, that the effect of the purchase was a payment of the compromise note by the said note of the purchaser, and that he had no claim, at law or in equity, upon the original debt. — *Ibid.*

CONFIRMATION.

See COMPROMISE OF DEBTS; CORPORATION, 4, 7; PARTNERSHIP, 5, 6, 7.

CONSTITUTIONAL LAW.

1. The Charter of Detroit provides that the Common Council may cause the streets to be graded and paved, and assess the whole expense of such grading and paving in front of any particular lot, to the center of the street, upon such lot, and makes such

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assessment a lien upon the premises until paid, and also a personal charge against the owner, and authorises a warrant for distress and sale of his goods for the same. Whether this provision is constitutional and valid, *quere?* *Held*, by MANNING J. and MARTIN CH. J. that it is: By CAMPBELL and CHRISTIANCY JJ., that it is not. — *Woodbridge v. City of Detroit*, 274.

2. MANNING J. held: (*a.*) That the provisions in the Constitution with respect to taxation do not apply to assessments for local improvements; and valuation of the property taxed for such improvements is not a necessary element in the apportionment of the taxes. CHRISTIANCY J. concurred. — *Ibid.*

(*b*). That such assessments need not be co-extensive with the county, city or ward in which the improvement is made, and that the rule of apportionment, by valuation of property or otherwise, is for the Legislature to determine. CHRISTIANCY J. concurred substantially, though differing as to what is apportionment. — *Ibid.*

(*c*). That there is nothing in the power of taxation itself requiring a tax to be apportioned in any particular way, and that the rule by which the amount of tax to be paid by each tax-payer is to be determined — which is all that is meant by apportioning a tax, when applied to him — can not be made a test of the taxing power. — *Ibid.*

(*d*). That the provision in question is valid as an exercise of the power of taxation, and in no sense an exercise of the right of eminent domain. There are here all the characteristics of a tax: A public burden imposed by law; a description of the property and persons by whom it is to be borne; the contingency on the happening of which it is to be imposed, and the apportionment of it in pursuance of law. The demand of each person is not made without reference to the amount contributed by others, but the aggregate cost of the whole work is apportioned among the several lot owners in proportion to the work done in front of their respective lots. — *Ibid.*

MARTIN CH. J. concurred in all respects with MANNING J. — *Ibid.*

3. CHRISTIANCY J. held: (*a*) That to constitute a tax or assessment, or an exercise of the power of taxation, there must be a common public burden within some particular district, which burden must be apportioned by some rule of apportionment, by which the amount paid by one person or piece of property shall bear some relation to, or be affected by, the amount paid by another: that there is here no public or common burden within the district to be imposed, and consequently no apportionment. It is a private individual burden, imposed for a public purpose; each lot or tract, and the owner, being charged in gross with the entire ex-

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pense of the improvement in front of it, without any reference to the amount to be paid by any other lot or tract, and the amount paid by one having no relation to, nor being increased or diminished by, that paid by another. — *Ibid.*

(*b*).That this burden is, therefore, not a tax, nor an assessment; nor is the mode of apportioning it an exercise of the taxing power; that it rests entirely upon the idea of a duty on the part of the owner, to make the improvement in front of his lot; in this respect resembling a police regulation; but that it can not be justified as the exercise of the police power, because *first*, the idea of a duty is not carried out — the owner not being allowed to make the improvement — and, *secondly*, because the raising of money for the grading and paving of streets is not a subject for the exercise of the police power, but falls directly within the exercise of the taxing power. — *Ibid.*

(*c*).That the proceeding authorized by the charter takes private property for a public improvement, without compensation, and in a mode not authorized by the Constitution. — *Ibid.*

(*d*).That when property is taken in payment of a tax or assessment, the law presumes compensation in the proper application and expenditure of the tax; but when taken without any reference to the amount contributed by any other persons or property, it is an arbitrary, forced contribution, and there is no such presumption. — *Ibid.*

4. Campbell J. concurred with Christiancy J. in his reasoning as to the illegal character of this system of charges upon property and its owners. He also held: (*a*.) That the Legislature could not vest in the city authorities the power to make improvements, and charge the expense upon individuals on the idea of private benefits conferred. — *Ibid.*

(*b*).But that if it could, this provision [of the charter is not valid, since it makes no provision for ascertaining such benefits. The Legislature can not arbitrarily determine that any lot is benefited by the precise cost of an improvement in front of it, and that no other lot is benefited at all. — *Ibid.*

(*c*).That the clauses in the Constitution requiring taxation to be by uniform rules, are applicable to the case of taxes or assessments for local improvements of this character; that they must be assessed upon some uniform standard, either of value or something else, which will afford a means of comparison; and that while there is no restriction upon the Legislature in defining the size of the districts within which the apportionment of the burden is to be made, single lots, made chargeable, as in this case, without any reference to size or extent, are not districts, and there is no room for apportionment or uniformity. — *Ibid.*

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5. To authorize a court to declare a statute unconstitutional, it should be able to point out the part of the Constitution violated, and the infraction should be clear and free from a reasonable doubt.—*Tyler v. People*, 320.

6. There is no constitutional objection to the provision (§5944 of Compiled Laws) for the prosecution and punishment here of a homicide committed by a mortal blow given out of the state, from which death results within it. — *Ibid.*

7. The provision in the tax law of 1858, which attempts to confer upon Circuit Court Commissioners the power to adjudicate upon tax titles, is unconstitutional and void. — *Waldby v. Callendar*, 430.

CONSTRUCTION OF STATUTES.

1. The Statute requiring Justices of the peace to keep a docket, and enter therein the judgments rendered by them, is directory only. — *Hickey v. Hinsdale*, 267.

See STATUTES CONSTRUED, &c.

CONTEMPTS.

See WITNESS, 1.

CONTRACT.

1. An instrument in writing, deliberately adopted by the parties, must stand as written, although the parties may have mistaken its legal intent. — —*Holmes v. Hall*, 66.

2. A writing, given by a debtor to his surety for the debt, providing that on the failure of the debtor to pay the debt within thirty days, the said surety might take immediate possession of the goods, &c., in possession of the debtor, in the store and premises occupied by him, and out of the same to sell so much as will pay the debt, and a reasonable compensation for his services, and re-deliver the balance to the debtor, is not a mortgage, for it does not purport to change in any way the title to the property. — *Ibid.*

3. Neither is such an instrument a pledge — no possession being given with it. — *Ibid.*

4. Such an instrument is a mere naked power, not coupled with any present interest, and can not operate to give the surety any rights in the property itself until reduced to possession. And, therefore, the lien of an attachment levied before possession taken under such instrument, must prevail over it. — *Ibid.*

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5. Complainant, as president and agent of the Baltimore Mining Company, made a written agreement to sell to H. and his associates the location of the Baltimore Co.; they to pay therefor $4,500, and to deliver to him "proper certificates of one-fifth the entire interest in said location, and in the capital stock of a company to be formed for mining thereon, to be forever unassessable, and to be delivered to the shareholders" of the Baltimore Company. To this was attached an undertaking on the part of H. and his associates to take stock in the proposed new company, according to the tenor of this agreement. The $4,500 was paid, and complainant transferred the location to H., who gave back an undertaking, that on the formation of the proposed new company, on such location, one-fifth of its stock should be issued to the president of the Baltimore Company, "*to be endorsed by him and delivered to the shareholders*" of that company. A new company, the Vulcan, was formed as contemplated by this arrangement, to which H. conveyed the Baltimore location; and the association, in their articles, state their object to be the prosecution of mining operations, on the location obtained from the Baltimore Company, "*or on any other lands that may be leased, located or bought by the association for mining purposes.*" The stock for the shareholders of the Baltimore Company was not delivered. Complainant afterwards, in his own name, but claiming to be trustee of such shareholders, filed a bill in Chancery, alleging that the Vulcan Company had purchased another location in the name of H., and in order to defraud him and the shareholders of the Baltimore Company of their rights under the agreement, the shareholders of the Vulcan had formed a new Company — the Minnesota, since incorporated — to which H. had conveyed such new location; that the Vulcan Company was now to all practical purposes dissolved and dead, and the Minnesota fraudulently and collusively substituted in its place, and the latter is now in fact and in truth the Vulcan — and praying that it might be decreed to deliver to complainant, as president of the Baltimore Company, for the use thereof, one-fifth of its stock; and for an account.

It seems that the contract on the part of H. and his associates, was not with complainant as *trustee* of the Baltimore Company, but with the *company* acting through him as its agent; and that the company was a necessary party complainant to the bill. — *Titus v. Minnesota Mining Co.*, 183.

6. *It seems*, also, that the supplementary agreement given by H. to complainant is of no binding force, there being no proof that the associates of H. authorized any modification of the first agreement, and the authority of the Baltimore Company to complainant, to make sale of their location, not conferring upon him power to make partition or distribution of the proceeds of the sale. — *Ibid.*

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7. The Vulcan Company being still in existence, and the owner of the location purchased of the Baltimore, it is not and can not be identical with the Minnesota, and it should be defendant in the suit. — *Ibid.*

8. The insertion in the articles of the Vulcan Company of a clause looking to the prosecution of mining operations on other lands than those purchased of the Baltimore, could not enlarge the rights of the Baltimore Company under the agreement, nor place the Vulcan under obligation to purchase other lands for such operations. It was without consideration from the Baltimore, and that company was not a party to it. The Vulcan Company might strike out that clause without giving the Baltimore any right to complain. — *Ibid.*

9. There was no fraud upon the Baltimore Company, or upon complainant, in the members of the Vulcan Company purchasing a new location, and forming a new company to work it, to the exclusion of complainant. — *Ibid.*

10. Nor does proof showing that H. bought the location now occupied by the Minnesota, stating at the time that he bought it for the Vulcan Company, and that the agent of that Company, without its authority, worked for a time upon it, representing it to have been bought by that company, and that the Vulcan Company declined to take it, and its members formed a new company with the express design of excluding the Baltimore Company from the benefits its shareholders would have derived from its being purchased by the Vulcan, make out any case of fraud upon the Baltimore Company, since it does not deprive it or its shareholders of any right intended to be given, or which it or they had a right to demand, under the original agreement. — *Ibid.*

11. A promissory note dated July 20, was by its terms payable "One year, August 15th, after date." *Held*, that it was payable not one year after its date, but one year from the fifteenth day of August after its date. — *Washington Co. Bank v. Jerome*, 490.

12. Plaintiff made a parol contract with L. to make certain improvements on lands of the latter, for which he was to be paid in case L. returned from California where he was going, but if L. did not return, plaintiff was to have the land. L. died in California, and plaintiff presented a claim for the improvements against the estate. — *Held*, that he could not recover, but must look to the land as his pay. — *LaRoe v. Freeland*, 581.

See CORPORATION; LAND CONTRACT; SPECIFIC PERFORMANCE.

CO-PARTNERSHIP.

See PARTNERSHIP.

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CORPORATIONS.

1. The authority to sell the franchises of a plank road corporation on execution, is derived entirely from the statute, and the sale can be made in no other mode than that pointed out by the statute. — *James v. P. & G. Plank Road Co.*, 91.

2. That mode is a sale of the franchise to such person as will satisfy the execution, with the legal fees, and take the franchise for the shortest period of time. — *Ibid.*

3. A sale of the franchise for a certain period, in part payment of the execution, is entirely unauthorized and void. — *Ibid.*

4. The acquiescence of the stockholders in the purchaser taking possession under such an invalid sale of the franchise of a plank road corporation, their payment to him of tolls for passing over the road, and the expenditure by him of moneys in repairing the road, with their knowledge, will not confirm and render valid such a sale. — *Ibid.*

5. A certificate issued by a corporation in the ordinary form of certificates of stock, but containing a promise on the part of the corporation to pay interest thereon until the happening of a specified event, constitutes the person to whom it is issued a stockholder and member of the company. — *McLaughlin v. D. & M. Railway Co.*, 100.

6. The corporation can not by a vote of the stockholders, without the individual assent of the holder, oblige him to receive their bond, instead of money, for the interest upon such certificate. — *Ibid.*

7. If a railway corporation have authority to issue such a certificate, they may ratify one which has been issued by their officers without authority. And, it is sufficient evidence of such ratification that the corporation, at a regular meeting of the stockholders, passed a resolution for the payment in their bonds of interest on such certificate. — *Ibid.*

See CONTRACT, 7.

COUNTERFEIT MONEY.

See EVIDENCE, 3, 4.

COUNTY COURTS.

1. The County Courts, as they existed in 1848, had jurisdiction of actions of ejectment. — *Wattles v. Warren*, 77.

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2. The general statute regulating proceedings in ejectment, was applicable to the County Courts, except so far as the proceedings marked out by it were inconsistent with the summary proceedings prescribed for the County Courts. — *Ibid.*

CRIMINAL LAW.

1. Where a statute enumerates several elements as combining to create a crime, the crime can not properly be described without including all these elements. — *Koster v. People*, 431.

2. Under the statute which punishes "every person who shall break and enter, in the night time, any office, shop, railroad depot or warehouse, not adjoining to or occupied with a dwelling house," with intent to commit a felony, an information which fails to describe the building entered as "not adjoining to or occupied with a dwelling house," is fatally defective. — *Ibid.*

See Error, Writ of, 1, 2; Evidence, 3, 4, 5, 6; Homicide; Jurors; Recorder of Detroit; Special Verdict.

CURTILAGE.

See Dwelling House, 1.

DAMAGES, ASSESSMENT OF.

See Practice in Circuit Courts, 1, 2, 8.

DESCRIPTION.

See Mortgage of Chattels.

DETROIT CITY.

See City of Detroit.

DETROIT RIVER.

See Riparian Rights.

DETROIT WATER COMMISSIONERS.

I. The Board of Water Commissioners of Detroit do not exceed their powers in contracting themselves to furnish and put in water pipe on private property, in a case which they regard, in good faith,

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as a proper one for the exercise of their discretion in using means to prevent waste and ensure security. — *Hale v. Houghton*, 458.

2. So far as third persons are concerned, the superintendent and engineer is the proper medium of negociation with the Board. And if he exceed his authority, and make a contract which the Board repudiate, third persons are not to be injuriously affected thereby, or deprived of rights acquired in good faith by dealing with an agent upon whose authority they had a right to rely. — *Ibid.*

3. Where, therefore, the superintendent and engineer contracted in the name of the Board to put in water pipe upon private premises, and put the same in accordingly, and the Board refused to confirm the contract; *Held*, that such refusal did not take from the owner of the premises the right to the pipe, but amounted to an election on the part of the Board to look to the superintendent for payment, and the latter might sue and recover upon the contract in his own name. — *Ibid.*

DIVISION OF TOWNSHIPS.

See MANDAMUS.

DOCKET.

See JUSTICE OF THE PEACE, 1, 2, 8.

DWELLING HOUSE.

1. A building thirty-six feet distant from a man's house, used for preserving the nets employed in the owner's ordinary occupation of a fisherman, and also as a permanent dormitory for his servants, is in law a part of his dwelling, though not included with the house by a fence. A fence is not necessary to include buildings within the curtilage, if within a space no larger than that usually occupied for the purposes of the dwelling and customary outbuildings. — *People v. Pond*, 150.

2. A man assaulted in his dwelling is not obliged to retreat, but may use such means as are absolutely necessary to repel the assailant from his house, or prevent his forcible entry, even to the taking of life. And, if the assault or breaking is felonious, the homicide becomes, at common law, justifiable, and not merely excusable. — *Ibid.*

ENDORSER.

See EVIDENCE, 17.

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ERROR.

See ESTATES OF DECEASED PERSONS, 1, 2; PRACTICE IN CIRCUIT COURTS, 1, 2, 8.

ERROR, WRIT OF.

1. Proceedings in the Circuit Court, under the Bastardy Act, can not be removed into this court by writ of error. — *Cross v. People*, 113.

2. The defendant being found guilty on an indictment for nuisance in maintaining a mill dam, and a judgment or order thereupon entered that the said mill dam be removed, and that a writ issue to the sheriff for its removal; *Held*—

   (*a*). That such judgment or order was such a final judgment or determination as error would lie upon:

   (*b*). That the power to order such removal can not precede, but must be exercised at the time of imposing punishment by fine or imprisonment, and form part of the same judgment; and no such punishment having been imposed, the order to remove the nuisance was erroneous:

   (*c*). But that although such judgment was erroneous, yet the errors assigned in the case being all based on decisions of the court preceding the judgment, this court will look into the errors assigned, and if any of them are sustained, will reverse the judgment on that account, and order a new trial, instead of ordering an absolute reversal for the error in the judgment itself.— *Crippen v. People*, 117.

3. Affidavits on which a motion for a new trial was based in the court below, form no part of the record, and can not be looked into in this court, for the purpose of determining whether the court erred in denying the motion. — *Ibid.*

4. Error will not lie on a conviction in the Recorder's Court of Detroit for an offense against a city ordinance. — *Jackson v. People*, 262.

ESTATES OF DECEASED PERSONS.

1. Where, on appeal from the decision of commissioners disallowing a claim against the estate of a deceased person, declaration is filed in the Circuit Court on such claim, but containing, also, a count on an account stated with the administrators as such, such count may be treated as surplusage, and judgment against the claimant will not be reversed because the jury failed to pass upon the issue made on such count. — *Fish v. Morse*, 84.

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2. Where commissioners have been appointed to examine and adjust claims against the estate of a deceased person, the estate is not bound by an account stated with the administrators. And, therefore, in a suit against the estate, a count on such an account stated is bad. — *Ibid.*

3. Where an appeal is taken to the Circuit Court from the action of commissioners appointed to audit claims against the estate of a deceased person, the Circuit Court should not render judgment in the common law form, but simply allow or disallow the claim. — *LaRoe v. Freeland*, 531.

EVICTION.

See LANDLORD AND TENANT.

EVIDENCE.

1. The averments on the part of the propounder of a will should include everything necessary to constitute it a valid will under the statute, so that a verdict finding the truth of these averments, without more, would bring the will within all the express requirements of the statute. He must, therefore, aver the soundness of mind of the testator at the time of the execution of the will, and the burden of proof is upon him to prove that fact.— *Beaubien v. Cicotte*, 9.

2. But upon questions of evidence, growing out of any presumption of sanity affecting the burden of proof in particular cases, the Court express no opinion. — *Ibid.*

3. Where an assignment for the benefit of creditors is attacked as fraudulent, it is competent for the creditors attacking it to prove the declarations of the assignor, made after the assignment was signed and delivered, but before the schedules were made out and attached, and while the assignor was engaged in preparing them. —*Wyckoff v. Carr*, 44.

4. Under the statute (§5811 of Comp. L.) which provides that "the lawful existence of any bank out of this state shall be presumed upon evidence that such bank is actually engaged in the business of a bank," evidence of general reputation in the community of the existence of a bank in another state, and that its bills pass current from hand to hand in the business transactions of the day, is admissible as tending to show that there was *de facto* a bank "engaged in the business of a bank." — *Jennings v. People*, 81.

5. Such evidence being admissible, its weight is for the jury; and it is not error for a court to charge that, if the jury are satis-

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fied from such testimony that there was such a bank, it would be sufficient evidence to establish that fact. — *Ibid.*

6. It is competent [for defendant, on the trial of an indictment for causing a public nuisance in keeping up a mill dam, to show by the cross examination of witnessess for the prosecution, that they have commenced civil suits for injury caused by the same dam, and then agreed together to suspend action in such suits, and get defendant indicted, and, in that way, procure the removal of the dam. Such evidence is admissible to show the interest of the witnesses in the public prosecution, and the influence it might have on their testimony. — *Crippen v. People*, 117.

7. It is competent for defendant, in such case, to show that former owners of the mill were indicted and tried for nuisance in keeping up the same dam, and acquitted, and that the question litigated on the former trial was whether the dam was a nuisance or not; as such acquittal is evidence that the dam was not a nuisance at that time, though not evidence that it has not since become such. — *Ibid.*

8. After judgment pronounced by a justice and before the proceedings are entered in his docket, it is competent to prove the judgment by the oath of the justice, who produces his minutes on the trial, which are as full and complete as the entry on the docket is required to be. — *Hickey v. Hinsdale*, 267.

9. Where, on a trial for murder, it appeared that the deceased had been absent from the neighborhood of the prisoner some eight or ten months preceding the alleged offense; — *Held* competent for the prosecution to show the state of feeling between the prisoner and the deceased immediately preceding such absence. — *Dillin v. People*, 357.

10. Where evidence is ruled out as not proper on cross-examination, the correctness of the ruling will not be inquired into where it appears that the witness is afterwards called by the party offering the evidence, and examined fully on the subject. — *Ibid.*

11. Where on a trial for murder, a witness for the prisoner is examined as to the prisoner being present and transacting business at a place near the scene of the alleged murder, and near the time it was claimed to have been committed, it is not improper to permit the prosecution to show, by the cross-examination of the witness, any facts having a tendency to show from which direction the prisoner came to that place; as, that the witness went out and found tracks which, at the time, he believed and stated were the prisoner's, coming towards that place; and the like. — *Ibid.*

12. It is competent for a court to admit evidence which will not be

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relevant unless brought home to the prisoner by further proof. But if such further proof is not given, it is the duty of the court to strike out the evidence so admitted. — *Ibid.*

18. The prosecution, on undertaking subsequently to connect the prisoner with it, were permitted to show a corrupt agreement of the father and one of the counsel of the prisoner, to keep an important witness away from the trial. No evidence was given bringing this agreement home to the prisoner. The court charged the jury that they were at liberty to take into consideration and determine, from all the evidence, whether the inducements held out to the witness to keep away, were by the authorized agents of the prisoner. — *Held* erroneous, and that the court should have instructed the jury to discard entirely the evidence of this agreement. — *Ibid.*

14. Where evidence was given by the prosecution which indicated strong mental agitation and excitement on the part of the prisoner, with an attempt to conceal it, immediately after the time when (as the evidence tended to show) the murder was committed, it was *held*, that the prisoner was entitled to prove the conversation had by him at the time, as bearing upon the question of his mental agitation and excitement, and tending to disprove the excitement, or to show its nature and extent. — *Ibid.*

15. After the death of the testatrix, a will twenty-five years old was discovered, in a barrel among waste papers, and either torn or worn into several pieces, which were scattered loose among the papers in the barrel. Whether the injury to the instrument was done by the testatrix or by some other person, and if by her, whether accidentally, or intentionally and for the purpose of revoking the will, are questions of fact for the jury; and to aid them in determining these questions, and not as separate and independent evidence of a revocation, the declarations of the testatrix, made after the date of the will, that she had destroyed it, are competent evidence. — *Lawyer v. Smith*, 411.

16. Where a subscribing witness to a will was called to prove it upwards of thirty years after its date, and testified that he signed it as a witness, but that he had no distinct recollection of seeing the testratrix sign it: *Held* that questions to him whether, looking at the attestation clause, he had any doubt she signed it in his presence, and whether he ever witnessed an instrument in that form without knowing what it was, and whether he had any doubt that the persons whose names were to it were present at the time of its execution, were not incompetent, and that it was for the jury to give such weight to his evidence in answer thereto as they might think it entitled to under all the circumstances of the case. — *Ibid.*

17. Proof of any one or more of the legal conditions necessary to

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charge an endorser, has no tendency whatever to prove a compliance with the rest. — *Ciootte v. Morse*, 424.

18. A party's own entries on his books of account can not be admitted as evidence in his behalf, unless a foundation be first laid by proving that he had no clerk, that some of the articles charged have been delivered, that the books produced are the account books of the party, containing original entries; and by further proof by those who have dealt and settled accounts with him, that he keeps fair and honest accounts. — *Jackson v. Evans*, 476.

19. The servant of a man dealing in brick, who keeps a tally book or slate upon which he makes memoranda of sales during the day, reporting them to his employer at night, who enters the amount upon his regular account books, is not a *clerk* within the meaning of this rule, and such regular account books are to be considered the books of original entries. — *Ibid.*

20. Where in charging the brick there was entered opposite each charge of a load the name of the teamster who hauled it, these teamsters should all be called to verify the charges, or their absence accounted for, before the books are received in evidence. — *Ibid.*

21. It is not competent, in order to dispense with the necessity of calling the teamsters, to prove by others that if called it would not be possible for them to testify from recollection to the quantity hauled. The main fact to be established is that the articles have been delivered; and it is only on failure to prove the delivery, or the quantity, by the teamsters when called, that the books are received as the next best evidence. — *Ibid.*

22. The account books kept by a party are evidence of so slight a character that no extension of the rule which admits them, beyond the apparent necessity of the case, should be allowed. Both the servant who delivered and the teamsters who hauled the brick, in such a case, should be called, to testify to their recollection; and the books are only received as evidence upon the presumption that no proof exists which has not been adduced. — *Ibid.*

23. The witnesses to prove that the party keeps honest books, should be able to identify the books, and to testify to settlements made from the entries on such books. It is not sufficient that they testify to having made settlements with the party, from bills presented, which they found honest, without being able to testify whether such bills were from the account books or not. — *Ibid.*

See Assignment, 1; Breach of Promise to Marry; Compromise of Debts, 1; Contract, 1; Justices' Courts; Millers and Mill Owners, 8; Notice; Officer; Partnership; Pleading in Chancery.

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EXCEPTIONS.

1. To enable this court to judge of the propriety of instructions to the jury in the court below, which instructions assume the existence of certain facts, the bill of exceptions must either contain the evidence of those facts, or a statement that there was such evidence. — *Tyler v. People*, 320.

See PRACTICE IN SUPREME COURT, 7; RECORDER OF DETROIT, 2.

EXECUTION.

See CORPORATION, 1, 2, 3, 4; EXEMPTION LAWS; OFFICER.

EXECUTORS AND ADMINISTRATORS.

See ESTATES OF DECEASED PERSONS.

EXEMPTION LAWS.

1. One engaged in a business which would entitle him to claim a team as exempt from execution, has a right, at his option, to select instead thereof other property to the value of $250, necessary to enable him to carry on the same business, though without a team he would be obliged to change entirely the mode of conducting the business. — *Wyckoff v. Wyllis*, 48.

2. It is the duty of an officer levying an attachment on the stock in trade of a judgment debtor, to have an inventory and appraisal made out, and permit the debtor to select out the amount exempt from execution; and, on the debtor failing to do so, to make the selection for him. And, if the officer neglect this duty, he is liable to the debtor for the value of the property exempt. — *Ibid.*

3. A village lot and house, of less than fifteen hundred dollars value, occupied by the owner with his family, does not require any action on the part of the owner to render it exempt from execution. — *Thomas v. Dodge*, 51.

4. The Statute exempting from execution, to amount of $250, the tools, implements, &c., to enable a person to carry on the business in which he is wholly or principally engaged, is not to be construed with reference to the productiveness or profit of one kind of business over another where two or more occupations are followed at the same time, but with reference to the occupation or business on which the party chiefly relies for a livelihood, and which engrosses the most of his time and attention, not for

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a day, or week, or month, but through the year. — *Smalley v. Masten*, 529.

5. Where, therefore, a suit was brought for property claimed as exempt under this statute, and it appeared that the plaintiff was engaged in two occupations — *Held*, erroneous for the Court to permit the plaintiff to call witnesses to prove which of his two occupations would be likely to bring him in the most. — *Ibid.*

EXONERATION OF BAIL.

See BAIL, EXONERATION OF.

FALSE IMPRISONMENT.

See COMMITMENT.

FINE MONEYS.

See LIBRARY FUND.

FORGERY AND COUNTERFEITING.

See EVIDENCE, 3, 4.

FRANCHISE OF CORPORATION.

See CORPORATION, 1, 2, 3, 4.

FRAUD.

1. One who has given a mortgage to be sold for a fraudulent purpose, can not set up the fraud as a defense to the mortgage in the hands of a bona fide purchaser. — *Bloomer v. Henderson*, 395.

See CONTRACT, 9, 10; PRINCIPAL AND AGENT.

FRAUDS, STATUTE OF.

See GUARANTY, 1, 2; PRINCIPAL AND AGENT; SPECIFIC PERFORMANCE.

FRAUDULENT CONVEYANCES.

See ASSIGNMENT, 1, 2.

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GRIST MILLS.

See MILLERS AND MILL OWNERS.

GUARANTY.

1. Where the owner of negotiable paper sells it, and accompanies the sale by a guaranty of collection thereon, it is not necessary to the validity of such guaranty that the name of the guarantee should appear in it. — *Thomas v. Dodge*, 51.

2. A guaranty so given is not within the Statute of Frauds. — *Ibid.*

3. Where the amount of the note guaranteed is such that suit may be brought upon it either in a Justices' Court or in the Circuit Court, the condition of the guaranty of collection is complied with by obtaining judgment in Justice's Court, and making due endeavor to collect it by execution. — *Ibid.*

4. And, it is not necessary that a transcript of such judgment be filed in the Circuit Court, and execution against lands issued thereon, where it clearly appears that the judgment debtor has no real estate liable to execution. — *Ibid.*

HABEAS CORPUS.

See REFORM SCHOOL.

HOMESTEAD.

See EXEMPTION LAWS, 8.

HOMICIDE.

1. The law does not require the necessity for taking human life to be one arising out of actual and imminent danger, in order to excuse the slayer; but he may act upon a belief, arising from appearances which give him reasonable cause for it, that the danger is actual and imminent, although he may turn out to be mistaken. The guilt of the accused must depend upon the circumstances as they appear to him, and he will not be held responsible for a knowledge of the facts, unless his ignorance arises from fault or negligence. — *People v. Pond*, 150.

2. Homicide *se defendendo*, in resisting an assault not made with felonious intent, is excusable where the danger to be resisted is to

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life, or of serious bodily harm of a permanent character, and unavoidable by other means in the power of the slayer so far as he is able to judge at the time. But he is bound if possible to get out his adversary's way, and has no right to stand up and resist if he can safely retreat or escape. — *Ibid.*

8. A man assaulted in his dwelling is not obliged to retreat, but may use such means as are absolutely necessary to repel the assailant from his house, or prevent his forcible entry, even to the taking of life. And, if the assault or breaking is felonious, the homicide becomes, at common law, justifiable, and not merely excusable. — *Ibid.*

4. The same circumstances which excuse or justify homicide in defense of one's self, will excuse or justify it in defense of his servant. — *Ibid.*

5. Whenever a forcible felony is attempted against person or property, the person resisting the attempt is not obliged to retreat, but may pursue his adversary if necessary, till he finds himself out of danger. But he may not properly take life if the evil may be prevented by other means within his power. — *Ibid.*

6. It is immaterial to the justification of homicide in resisting a forcible felony, whether the act was a felony at the common law, or made such by statute. — *Ibid.*

7. Private persons may forcibly interfere to suppress a riot or resist rioters; and they may justify homicide in so doing, if they can not otherwise suppress them, or defend themselves, their families or their property. — *Ibid.*

8. Manslaughter, committed by a mortal blow given on the River St. Clair, beyond the boundary line between the United States and the Province of Canada, and within a county in said Province, from which blow death ensued upon land, is not within the Crimes' Act of Congress of March 3d, 1857; and the Circuit Court of the United States has no jurisdiction of the same.— *Tyler v. People*, 320.

9. There is no constitutional objection to the provision (§ 5944 of Compiled Laws) for the prosecution and punishment here of a homicide committed by a mortal blow, &c., out of the state, from which death results within it. — *Ibid.*

See EVIDENCE, 9 TO 14.

HOUSE OF CORRECTION.

See REFORM SCHOOL.

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INFORMATION.

See CRIMINAL LAW.

ISSUE.

See PLEADING; PLEADING IN CHANCERY.

JOINT CONTRACT.

See RECOUPMENT.

JOINT STOCK COMPANIES.

See PARTNERSHIPS, 5, 6, 7.

JUDICIAL POWER.

See CONSTITUTIONAL LAW, 7.

JUDGMENT.

See ERROR, 2; JUSTICES' COURTS, 1, 2, 3; PRACTICE IN CIRCUIT COURTS, 2; REFORM SCHOOL, 1, 2.

JURISDICTION.

See BAIL, EXONERATION OF; HOMICIDE, 8, 9; PROCESS, 1; WITNESS, 1.

JURORS.

1. On the impanneling of a jury, it is irregular for counsel to put questions to the jurors called without interposing any challenge, and no error can be assigned to the action of the court in allowing jurors thus questioned, but not challenged, to be sworn to try the case. — *Crippen v. People*, 117.

2. A person who has formed and holds an opinion, that mill dams generally in that part of the country are nuisances, and, that all he is acquainted with are such, is not a competent juror for the trial of an indictment for nuisance in keeping up a mill dam, though he states that he is not much acquainted with the dam in question, and has not formed or expressed any opinion regarding it. — *Ibid.*

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JUSTICES OF THE PEACE.

See COMMITMENT; WITNESS, 1.

JUSTICES COURTS.

1. The entry of a judgment in the docket of a Justice of the Peace is *evidence* of the judgment, but is not the judgment itself. — *Hickey v. Hinsdale*, 267.

2. The statute requiring a Justice of the Peace to keep a docket, and to enter therein the judgments rendered by him, is directory only. — *Ibid.*

3. After judgment pronounced, and before the proceedings are entered in the docket, it is competent to prove the judgment by the oath of the Justice, who produces his minutes of the trial, which are as full and complete as the entry on the docket is required to be. — *Ibid.*

4. While the rules of pleading applied to Justices' Courts are extremely liberal, a cause of action must be as fully proved in those courts as in any other. — *Cicotte v. Morse*, 424.

5. Where a justice of the peace, in return to a certiorari, certifies the evidence as follows: "I do certify the following to have been the evidence before me in the above entitled cause," and the objection taken before him was that certain necessary facts had not been proved; *Held* that it must be presumed that the whole evidence is returned. — *Ibid.*

6. Where, in cases removed from Justices' Courts by certiorari, the court below has found facts upon pertinent evidence, this court will not review that finding. But no court has a right to assume a fact without any evidence legally tending to prove it, or to dispense with the proof of any distinctive condition affixed to an agreement. — *Ibid.*

LAND CONTRACT.

1. The estate of one in possession of land under a contract of purchase is that of a tenant at will. — *Crane v. O'Reiley*, 312.

2. A clause in a contract of purchase, that on default by the purchaser the seller might declare the contract void, and the seller should thereafter be deemed a mere tenant at will, and liable to be proceeded against as such, confers no new rights, and is declaratory merely of the actual relation and rights of the parties. — *Ibid.*

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3. The purchaser may, in such a contract, waive the right to a notice to quit on default. — *Ibid.*

LANDLORD AND TENANT.

1. Where a landlord, during the continuance of a lease, without the consent of the tenant enters upon the demised premises, which have been vacated by the tenant, and the entry is followed by a continuous possession inconsistent with the possessory right assured to the tenant by the lease, such possession amounts to an eviction, and precludes the recovery of rent while it continues. — *Day v. Watson*, 535.

2. And this is so whether the entry be for condition broken or not. If for condition broken, it signifies an intention to terminate the lease entirely; while if the landlord regard the lease as still continuing, the right to rent is suspended during the occupancy. — *Ibid.*

LEASE.

See LANDLORD AND TENANT.

LIBRARY MONEYS.

1. Under the present Constitution and statutes, all moneys which are paid into the office of the county treasurer, on account of fines, penalties, forfeitures and recognizances, are to be credited to the Library Fund, and apportioned and paid over by the treasurer to the proper local officers, without any deduction for expenses, either attending the collection of the particular sums paid in, or embracing the general criminal expenses of the county. The taxable costs in proceedings to collect, should be kept separate, and do not belong to this fund. — *People v. Treasurer of Wayne*, 892.

LIEN.

See CONTRACT, 2, 3, 4.

MANDAMUS.

1. Where, after the division of a township, the town boards have met and determined the amount of the township indebtedness to

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be paid by the new township, such amount is a fixed and liquidated demand against such new township, which it is the duty of its town board to allow, and to issue an order on the township treasurer therefor. — *Marathon v. Oregon*, 372.

2. If such town board refuse to perform this duty, mandamus to compel their action is the proper remedy, and not an action against the township to recover the amount of the demand.—*Ibid.*

3. On the hearing of an application for a mandamus, the party showing cause is entitled to open and close the argument. — *People v. Treasurer of Wayne*, 392.

MANSLAUGHTER.

See HOMICIDE.

MARRIAGE PROMISE.

See BREACH OF PROMISE TO MARRY.

MILLERS AND MILL OWNERS.

1. The statute regulating the duties of millers and mill owners (*Comp. L.* § 1833, *et seq.*), is meant to apply to such mills only as are in the habit of grinding for toll. — *Merrill v. Cahill*, 55.

2. Under this statute, millers who hold themselves out to the community as millers grinding for the public generally, are bound to a similar impartiality to that required of common carriers, innkeepers, and those following such public avocations. And it is as clearly their duty to receive grain when the mill is running, as to grind it when received. — *Ibid.*

3. The conversation between the person bringing grain to the mill to be ground, and the agent of the owner, who, under the owner's direction, refuses to receive the grain, is competent evidence as part of the *res gestæ*, in a suit against the owner under the statute, for such refusal. — *Ibid.*

4. Where two or more persons own and run such a mill, they are all liable for a refusal to receive the grain brought to be ground, whether the refusal come from one or all of such owners, or from the person in charge. — *Ibid.*

MINNESOTA MINING CO.

See CONTRACT, 5 TO 10.

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MONEY HAD AND RECEIVED.

See ASSUMPSIT; PRINCIPAL AND AGENT.

MORTGAGE.

See PLEADINGS IN CHANCERY, 1.

MORTGAGE OF CHATTELS.

1. Under the Canadian statute (20 *Vic. c.* 8, §4), which requires that a mortgage of chattels "shall contain such efficient and full description thereof that the same may be thereby readily and easily known and distinguished," a mortgage of a horse, describing it simply as "one sorrel horse," is, as to others than the parties to it, void for want of a sufficient description. — *Montgomery v. Wight*, 143.

2. Laws for recording chattel mortgages can have no force beyond the jurisdiction of the sovereignty enacting them; and the record of a chattel mortgage in Canada is, therefore, no notice to the creditors of the mortgagor who shall find the property in his possession in Michigan. And neither the statute of Canada nor of Michigan dispenses with the necessity of possession by the mortgagee, except where notice can be rendered effectual by recording the mortgage. — *Ibid.*

3. Where, therefore, a chattel mortgage, given by a resident in Canada, was properly put upon record as required by the Canadian law, but the mortgagor was left in possession of the mortgaged property, and brought the same into this state, where it was taken and sold on execution against the mortgagor; — *Held*, that the title under the execution sale must prevail over that under the mortgage. — *Ibid.*

See CONTRACT, 2.

MULTIFARIOUSNESS.

See PARTITION OF LANDS, 1.

MUNICIPAL CORPORATIONS.

1. A municipal corporation which creates a private nuisance, is prima facie liable for its continuance. — *Pennoyer v. Saginaw*, 534.

See CONSTITUTIONAL LAW, 1, 2, 3, 4.

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MURDER.

See EVIDENCE, 9 TO 14; HOMICIDE.

NAVIGABLE WATERS.

1. The term "navigable waters," as used in § 5944 of Compiled Laws, has the same meaning as in the Ordinance of 1787, and is not limited to waters where the tide ebbs and flows. — *Tyler v. People*, 820.

See ASSUMPSIT, 3; RIPARIAN RIGHTS.

NAVIGATION, RIGHTS OF.

See RIPARIAN RIGHTS.

NOTICE.

1. Possession of land by a grantor is no notice of any rights or equities in him, to one who acquires an interest in the land on the faith of his recorded conveyance. — *Bloomer v. Henderson*, 395.

NOTICE OF DEFENSE.

See PLEADINGS, 1, 2, 3.

NOTICE TO QUIT.

See LAND CONTRACT.

NOVATION.

See PAYMENT, 1, 2, 3.

NUISANCE.

1. A municipal corporation which creates a private nuisance, is prima facie liable for its continuance. — *Pennoyer v. Saginaw*, 534.

See ERROR, WRIT OF; EVIDENCE, 5, 6; JURORS, 2.

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OFFICER.

1. Where persons have in good faith acquired a lien upon property prior to a levy upon it, there is no such privity between them and the execution debtor, at the time of the levy, as can in any respect make his rights the measure of theirs, as between them and a purchaser under the execution. — *Nall v. Granger*, 450.

2. As between the purchaser at a sheriff's sale, and one who claims the goods as the mortgagee of the judgment debtor, the sheriff's return on the execution is not conclusive as to the time of the levy, but such mortgagee has a right to show that the levy was not made till after the time stated in the return, and after his right, as mortgagee, accrued. — *Ibid.*

3. Such evidence would show that there was no privity between the mortgagee and the judgment debtor, and that the sheriff had no right to make a return affecting the mortgagee or the property. — *Ibid.*

4. And where a purchaser, knowing of a mortgage on the property, colludes with the sheriff, and procures from him a false return of a levy before the giving of the mortgage, and purchases the property on condition that such false return shall be made; *Held*, in a suit between the mortgagee and the purchaser, that this fraudulent collusion may be shown, and any effect of the return on the rights of the mortgagee defeated on the ground of this fraud. — *Ibid.*

See CORPORATION, 1, 2, 3, 4; EXEMPTION LAWS.

PAROL AGREEMENT.

See SPECIFIC PERFORMANCE; TAX COLLECTOR, 1.

PARTIES.

See CONTRACT, 5, 7; PARTITION OF LANDS, 2.

PARTITION OF LANDS.

1. A bill in chancery for partition of lands held in common, set forth that defendant had purchased the lands at sales for taxes, which purchases were claimed to be void; and discovery was prayed with respect thereto, and that the same be declared void: — *Held*, that the bill was not multifarious. — *Page v. Webster*, 263.

2. The executors and devisees of a deceased tenant in common, not

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asking partition among themselves, may jointly file a bill in chancery to have their interests in the land set off from that of the co-tenant. — *Ibid.*

3. A bill for partition by executor and devisees set forth, that the undivided interest was devised to the latter in common, with the power, nevertheless, in the executor to sell and dispose of the same: — *Held*, a sufficient statement of the respective interests of complainants, who asked no partition as between themselves. — *Ibid.*

PARTNERSHIP.

1. One partner, after the dissolution of the firm, can not by his admission create a new partnership contract, nor revive a claim against the firm which has been barred by the statute of limitations. But except as to claims so barred by the statute, and others coming within a similar reason, the admission of one partner, made after such dissolution, having reference to previous actual partnership dealings or transactions, stands upon the same ground, and is evidence against the firm in like manner, as if made before the dissolution. — *Pennoyer v. David*, 407.

2. But such admission, made after dissolution, must be confined to cases where there have been *in fact* previous partnership dealings with the plaintiff, or some transaction with the firm out of which a liability to the plaintiff might have originated; and the fact that there have been such dealings or such transaction, must be shown by some general evidence, at least, outside of the admission itself. — *Ibid.*

3. Partners must sue in their individual names. A writ of replevin issued on behalf of partners in the name of their firm is void. — *Smith v. Canfield*, 493.

4. A partner binds his firm only on the theory of an implied agency for the purposes of the mutual adventure, and the agency does not extend beyond what may fairly be regarded as coming within its reach. — *Hotchin v. Kent*, 526.

5. The articles of a joint stock mercantile association prohibited the officers entrusted with the conduct of its business from making purchases on credit. They, notwithstanding, made a purchase on credit, first giving the seller a copy of the articles. — *Held*, that the association were not liable for the purchase unless subsequently ratified by them. — *Ibid.*

6. The officers themselves are not competent to ratify their unauthorized act. — *Ibid.*

7. The receipt of the goods by the association, or even the sale of

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them in the course of their business, would not of itself amount to a ratification, since the members can not be supposed to know that the purchase has been made in violation of their articles. — *Ibid.*

See PAYMENT, 1, 2, 3.

PASSING COUNTERFEIT MONEY.

See EVIDENCE, 3, 4.

PAYMENT.

1. A note received for a prior demand is payment of that demand if such is the understanding and assent of the parties. — *Hotchin v. Secor*, 494.

2. That such was the understanding and assent of the parties may be proved by their subsequent acts and conduct, as well as by direct proof of an express agreement. — *Ibid.*

3. Where the note of two members of an association was taken for the amount of a debt against the association, and this note was afterwards paid in part by the makers, and their notes on longer time taken for the balance; and suit being brought on the original debt, the court was asked to charge the jury "that it was not absolutely necessary to show an express agreement on the part of plaintiffs to receive the note in payment of the claim against the association; but that if the jury find, from all the circumstances of the case, and the subsequent acts of the plaintiffs in regard to said note, and in taking new notes of the makers, and extending the time of payment, they had acted and treated said notes as their own, and as received in payment of their claim, then the jury are authorized to take such facts into consideration, and find that the note was received by the plaintiffs in payment, if the evidence satisfies them that such was the fact;" *Held*, that this request presented substantially a correct view of the law, and the court erred in declining to charge accordingly. — *Ibid.*

See COMPROMISE OF DEBTS.

PENAL ACTION.

See MILLERS AND MILL OWNERS.

PLANK ROAD COMPANIES.

See CORPORATIONS.

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PLEADINGS.

1. The test of the sufficiency of a notice of defense under the general issue, is that it apprises the plaintiff of the nature of the defense relied upon, so that he may be prepared to meet it, and to avoid surprise on the trial. — *McHardy v. Wadsworth*, 849.

2. In an action on a promissory note made by two defendants, notice of defense was interposed, that the note was given for the purchase price of cows sold with warranty by plaintiff to defendants; the damages for a breach of which warranty defendants claimed to recoup from the amount of this note. The proof showed the note to have been given for the consideration stated, but that the sale was made by plaintiff to *one* of the defendants. — *Held*, that the notice was sufficient, under the test given, to warrant the admission of the evidence; especially as plaintiff in his bill of particulars, evidently designed to cover the consideration for the note, had claimed to recover for cows sold by him to the defendants. — *Ibid.*

3. Objection to a variance between the evidence and the pleading under which it is offered, must be held to be waived where the evidence is received and submitted to the consideration of the jury without the objection being taken. — *Ibid.*

See ESTATES OF DECEASED PERSONS, 1, 2; EVIDENCE, 1; JUSTICES' COURTS, 4.

PLEADINGS IN CHANCERY.

1. Where a bill was filed to foreclose a mortgage, and making other persons than the mortgagor parties, charging that one of them had given a prior mortgage on the same premises, which he had since paid, but caused to be assigned to one of the other defendants for the purpose of keeping it alive against complainant's mortgage; and asking that it be decreed to have been satisfied— but the bill did not show any privity of title to the land between the parties to the first and the parties to the second mortgage, or what was the state of the title at any time, or any obligation on the part of the first mortgagor which would entitle the second mortgagor, or his assigns, to require him to pay or remove such first mortgage; — *Held*, that the bill showed no title to relief as against the parties to such first mortgage. — *Wright v. Dudley*, 115.

2. Where a bill was filed to set aside a mortgage as fraudulent, and neither the mortgage, the bill nor the answer, contained any reference to a promissory note accompanying the mortgage; *Held*, that the existence of such a note was not involved in the issue, and evidence with respect to it, which was objected to

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when taken, must be disregarded at the hearing.—*Bloomer v. Henderson*, 895.

See PARTITION OF LANDS, 1, 2.

PLEDGE.

See CONTRACT, 2, 3.

POSSESSION OF LANDS.

See NOTICE.

POWERS.

See CONTRACT, 2, 3, 4.

PRACTICE IN CHANCERY.

See APPEAL IN CHANCERY.

PRACTICE IN CIRCUIT COURTS.

1. The Circuit Court can only refer to the clerk, for assessment and report, those cases on default in which such a written obligation or contract as is specified in the statute, is set forth in the declaration as the cause of action, or in which the action is upon a promissory note or bill of exchange, and the plaintiff has filed and served with his declaration a copy thereof.—*O'Flynn v. Holmes*, 95.

2. Where it is recited in the judgment entry, in a case not proper for such a reference, that the judgment was rendered upon the clerk's assessment of damages, but the prior order of reference to assess was to the *court* as it should have been, the court can not make any presumption, against the recital in the judgment, based upon such prior order, that the court actually assessed the damages; but the judgment imports absolute verity.—*I bid.*

3. It is competent for the court to assess damages after interlocutory judgment, without calling a jury, if none is demanded.—*—I bid.*

4. Where the maker and endorser of commercial paper are sued jointly, under the statute, and one is defaulted and issue joined as to the other, it is competent for plaintiff to have damages assessed against the defaulted party, by the jury sworn to try the issue joined as to the other, and upon their verdict and as-

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sessment to proceed to a joint judgment against both. — *Storey v. Bird*, 816.

See ESTATES OF DECEASED PERSONS.

PRACTICE IN SUPREME COURT.

1. What notice of hearing sufficient. — *Franklin v. Mansfield*, 99.

2. Where, after a case reserved for the opinion of this court has been noticed for hearing, an addition of specific questions is made to it by the Circuit Judge without the consent of one party, such party will not be required to go to a hearing of the case upon the notice previously given. — *Farrand v. Collins Iron Co.*, 186.

3. The original files of this court should not be altered, even by consent of parties, without the leave of the court. If an addition is desired, it should be done by stipulation, or other separate paper, without changing the original. — *Ibid.*

4. Where, after error assigned in this court, the defendant in error, without the leave of this court, obtains an amendment to the record in the court below, with a view to obviate the error assigned, this court will neither amend the transcript to make it correspond with the amended record, not award a certiorari to bring up the amendment. — *O'Flynn v. Eagle*, 186.

5. The case of *O'Flynn v. Holmes*, 7 *Mich.* 454, approved. — *Ibid.*

6. Under the circumstances of this case, the defendant in error allowed to make a new application to the court below to amend, with leave to plaintiff in error to discontinue at the costs of defendant in error. — *Ibid.*

7. The Supreme Court can not, on reversing a judgment on exceptions, proceed to give such judgment as the facts set forth in the bill of exceptions would warrant. The court can only consider those facts as they bear upon the rulings of the court below; and order a new trial if the exceptions are sustained. — *Pond v. People*, 150.

8. Damages on affirmance of judgment denied. — *Storey v. Bird*, 816.

9. On the hearing of an application for mandamus, the party showing cause is entitled to open and close the argument. — *People v. Treasurer of Wayne*, 392.

PRIVITY.

See OFFICER, 1, 2, 3, 4; PLEADINGS IN CHANCERY, 1.

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PRINCIPAL AND AGENT.

1. One acting as agent for the owner of property, has no right to make himself the agent of others for the purchase of the property, nor to take any advantage of the confidence his position inspires to obtain the title himself. — *Moore v. Mandlebaum*, 433.

2. Nor can such agent make a valid purchase from his principal without fully and fairly disclosing all the propositions he has received, and all the facts and circumstances within his knowledge, in any way calculated to enable the principal to judge of the propriety of the sale. — *Ibid.*

3. Where an agent for the sale of lands entered into an arrangement with third persons to purchase the lands jointly with them, for a certain price, if on examination he should think best, and they advanced him money which they authorized him to pay the owner for the refusal of the land until an examination could be made; and he, without disclosing this arrangement, represented to his principal that he had agreed to sell the lands for a less price; that that was all he could obtain; and that it would be necessary for him to have the title thereto in order to carry into effect the sale; and on these representations obtained to himself a deed of the lands, paying the owner the money so advanced to him, and giving his mortgage without personal obligation for the balance of the price at which he stated he had agreed to sell; but taking back a receipt for the money so paid, the condition of which was that in case the mortgage should not be paid when due, the land should revert to the principal, and the down payment be forfeited; *Held*, that the facts constituted a fraud upon the principal, which would authorize him to disaffirm the conveyance. — *Ibid.*

4. The land, in such case, in equity and good conscience still belonged to the principal. The effect of the transaction was to place it in the hands of the agent, subject to a trust in favor of the principal by operation of law. And it is competent to prove by parol the facts which create this trust. — *Ibid.*

5. And the arrangement between the agent and such third persons having fallen through, and the agent having subsequently sold the land to a bona fide purchaser, for a sum larger than the amount of his payment and mortgage; and conveyed the same, so that the principal was precluded from disaffirming his deed, as well as from enforcing the trust as to the land; *Held*, that he was entitled to recover from the agent, in an action for money had received, the difference between the price received by the agent, and the amount of his payment and mortgage. — *Ibid.*

6. The action in such case falls substantially within the rules ap-

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plicable to actions brought by a principal against his agent for money received by him on the sale of the principal's land. It is not brought to recover back the consideration paid on a contract rescinded, and the plaintiff is under no obligation to tender back what he has received before bringing suit. — *Ibid.*

7. No provision of the Statute of Frauds conflicts with such a suit. It is not brought on a parol contract required by the statute to be in writing, nor upon any express contract whatever; but on a duty on the part of the defendant which the law recognizes as springing from the whole transaction. — *Ibid.*

8. Though the plaintiff in such case might proceed in equity for the purchase price, on the ground of a trust, and be entitled to a discovery, yet he may, if he see fit, waive his right to a discovery, and proceed at law; taking upon himself the risk of being able to prove his case without the discovery. — *Ibid.*

9. As a general rule, when money has been received by a defendant under any state of facts which would, in a court of equity, entitle the plaintiff to a decree for the money when that is the specific relief sought, the same state of facts will entitle him to recover the money in an action of assumpsit for money had and and received. — *Ibid.*

See DETROIT WATER COMMISSIONERS.

PROBATE OF WILL.

See EVIDENCE, 1, 2.

PROCESS.

1. In the absence of a treaty with Great Britain authorizing it, the process of the District Courts of the United States sitting in Admiralty can not be executed in Canadian waters. — *Tyler v. People*, 320.

PROMISE TO MARRY.

See BREACH OF PROMISE TO MARRY.

PROMISSORY NOTES.

See CONTRACT, 11; EVIDENCE, 17; GUARANTY; TAX COLLECTOR.

RATIFICATION.

See PARTNERSHIP, 5, 5, 7,

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RECORDER OF DETROIT.

1. The Recorder's Court of Detroit can not reserve for the opinion of the Supreme Court questions arising upon the trial of offenses against the city ordinances. — *People v. Jackson*, 78.

2. Convictions in the Recorder's Court of Detroit, for offenses against city ordinances, can not be brought before this court for review on exceptions before sentence, under Chapter 197 of the Compiled Laws. — *People v. Jackson*, 110.

3. Error will not lie on a conviction in the Recorder's Court of Detroit for an offense against a city ordinance. — *Jackson v. People*, 262.

See REFORM SCHOOL, 3.

RECORDING LAWS.

See MORTGAGE OF CHATTELS, 2, 3.

RECOUPMENT.

1. In an action on a promissory note, given by two on a contract of purchase by one of the makers only, it is competent to recoup damages growing out of the contract of purchase, to the same extent as if the note had been given by the purchaser alone. — *McHardy v. Wadsworth*, 349.

REFORM SCHOOL.

1. Under the statute which requires courts sentencing offenders to the State Reform School to certify to the keeper thereof the age of the person sentenced, as nearly as can be ascertained by testimony, the court having certified the age of a convict to be under sixteen years, must be conclusively presumed, so far as all collateral inquiries are concerned, to have performed its duty; and the Supreme Court can not assume or inquire, on *habeas corpus*, whether other than legal evidence was admitted on this question. — *Matter of Mason*, 70.

2. A prisoner having been sentenced and committed to the Reform School, as under sixteen years of age, the court sentencing him can not, on the ground of a mistake as to the prisoner's age, proceed to give a new sentence. The sentence is not made void by such mistake. — *Ibid.*

3. The Recorder of Detroit has no authority to issue a *habeas corpus* to take a prisoner from the Reform School, who has been lawfully sentenced there, unless to testify as a witness. — *Ibid.*

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4. Where it appears, in return to a writ of *habeas corpus*, that the prisoner is held by an officer who has no legal authority for the purpose, but that there is authority in the keeper of the State Reform School to detain him, under a legal commitment from which he has not been properly discharged, the court will not order him released, but will remand him to the custody of the keeper of the Reform School. — — *Ibid.*

REPEAL OF STATUTES.

1. Where an act of the Legislature appropriated highway taxes collected in a certain town, among others, to a special purpose, and appointed commissioners to disburse the same, but before the taxes had been paid over, though after legal proceedings commenced by the commissioners to compel the payment, the act was amended by striking out all that related to such town, and the amendatory act contained no saving of rights accrued or proceedings commenced; — *Held*, that the right, under the original act, to the moneys collected in such town, was thereby terminated. — *Tivey v. People*, 128.

REPLEVIN.

See ABATEMENT, 1, 2, 3, 4.

RETURN OF PROCESS.

See OFFICER, 1, 2, 3, 4.

RIPARIAN RIGHTS.

1. Although, in England, in the common law sense of the term, those streams only are navigable in which the tide ebbs and flows, yet all rivers and streams above the ebb and flow of the tide, which are of sufficient capacity for useful navigation, are public rivers, and subject to the same general rights which the public exercise in highways by land, and which they possess in navigable waters. — *Lorman v. Benson*, 18.

2. The common law principle, that the soil under such tideless public rivers to the thread of the stream is in the owner of the adjacent bank, prevails in this state, and is applicable to the Detroit River. — *Ibid.*

3. The owner of the bank is entitled to every beneficial use of the soil under the river which can be exercised with a due regard to the public easement, and any trespass which interferes with

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such use, like an obstruction preventing the taking of ice, gives him a right of action for the damages thereby occasioned.—*Ibid.*

4. The right to raft logs down a stream does not involve the right of booming them upon private property for safe keeping and storage. — *Ibid.*

SALE OF CORPORATE FRANCHISE.

See CORPORATION, 1, 2, 3, 4.

SANITY.

See EVIDENCE, 1, 2.

SENTENCE.

See REFORM SCHOOL.

SET OFF.

1. A bill in Chancery can not be sustained to compel a vendor to receive his own paper on the contract of sale, when he has not agreed to do so, and the purchaser has not bound himself to take and pay for the property. — *Hale v. Holmes*, 37.

2. Nor will equity compel a set off of the vendor's debt on the contract of sale, in such case, since there is no contract on the part of the purchaser against which to allow it. It is at his option to purchase the property or not; but, if he do so, he must pay for it in accordance with the contract of sale. — *Ibid.*

3. The insolvency of one party, even in the case of mutual credits, is not of itself sufficient to authorize an equitable set off.—*Ibid.*

SHERIFF.

See CORPORATION, 1, 2, 3, 4; EXEMPTION LAWS; OFFICER.

SPECIAL VERDICT.

1. The court can add nothing to a special finding, or infer any facts which the jury have not inferred and set forth. The court can draw only the legal conclusions from the facts found.—*People v. Wells*, 104.

2. Where defendant was indicted under §5899 of Compiled Laws,

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and charged with illegally issuing a certain draft in the similitude of a bank bill, and a special verdict was returned, which found that the defendant paid out the draft on a check drawn upon him, but did not find that defendant was in any way a party to the instrument, or in any manner connected with, responsible for, or interested in it, except what might be inferred from the single fact of his paying it out; — *Held*, that such "paying out" of the draft is not necessarily equivalent to, or identical with the "issuing" of the paper, within the meaning of the statute, and that the special verdict failed, therefore, to bring the defendant within the statute. — *Ibid.*

SPECIFIC PERFORMANCE.

1. In a contract for the conveyance of land, the time, place and mode of payment, are not considered matters of substance, unless by the express stipulations of the parties they are declared to be so, or unless from the special nature of the case, and the necessary intention and understanding between the parties, they must be deemed material. Therefore, where on a bill for the specific performance of a parol agreement for the purchase and conveyance of lands, the contract as proved differed in these particulars from that set out in the bill, but corresponded in other respects; *Held*, that the variance was not material. — *Bomier v. Caldwell*, 463.

2. Where the parties to an agreement have not expressly stipulated that performance at a particular time shall be an essential part of the agreement, and where from the nature and circumstances of the contract, and the situation of the parties, there would be no particular hardship upon the party against whom the execution of the contract is sought to be enforced, — the conduct of the party in default not being unfair, or his claim unconscientious — a Court of Equity, so far as performance at the time is concerned, will aid the party in default, and decree a specific execution of the agreement as the only adequate measure of equitable justice between the parties. — *Ibid.*

3. Where under a parol contract for the purchase and conveyance of lands, the vendor had caused the land to be surveyed, and received upwards of one-half of the purchase price, and put the vendee in possession, and had permitted him to retain that possession for several years in reliance upon the contract, without taking any step to put an end to it; *Held*, that these acts of the vendor constituted such a part performance as to take the case out of the operation of the Statute of Frauds, and entitle the vendee to a specific performance of the agreement.—*Ibid.*

4. In a bill for the specific performance of a parol contract for

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the conveyance of land, the general facts relied upon, showing a part performance as a ground for taking the case out of the Statute of Frauds, and for enforcing the agreement, must be specifically set forth. And where evidence had been taken in the case showing valuable improvements made by complainant on the land in controversy, but there was no allegation in the bill with respect to such improvements; *Held*, that such evidence could not be considered in the decision of the cause. — *Ibid.*

STATUTES.

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TAX COLLECTOR.

1. A parol agreement, by a tax collector, to receive in payment of taxes a draft of his creditor upon himself, is not valid, — our statute requiring the acceptance of a draft to be in writing. — *Elliott v. Miller*, 132.

2. But such tax collector, if the draft had been accepted by him, would have had no right to receive it in payment of taxes, since the taxes are due not to him, but to the public, and claims against him are not a legal tender for or offset against the taxes. — *Ibid.*

3. An agent of a tax collector having received in payment of taxes a draft upon the collector, and on the collector refusing to accept or allow the same, having paid over the amount of the tax himself, is a holder of the draft for value, and entitled to collect the amount from the parties thereto. — *Ibid.*

TAXES.

See CONSTITUTIONAL LAW, 1, 2, 3, 4, 7.

TAX SALES.

1. A tenant in common of lands can acquire no title to the interest of his co-tenant, by bidding in the lands at a sale of the whole for delinquent taxes. — *Page v. Webster*, 263.

See CITY OF DETROIT, 1.

TENANT AT WILL.

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See PARTITION OF LAND; TAX SALES.

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WATER RIGHTS.

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WITNESS.

1. A magistrate having jurisdiction, under Chapter 194 of the Compiled Laws, to examine and commit for trial, or hold to bail, persons charged with crimes not cognizable before a justice of the peace, has no power to commit a witness for refusing to testify on such examination. He has no powers except such as are expressly conferred by this chapter. — *Matter of Farnham*, 89.

2. A legatee in a will is neither a party to the probate proceeding, nor one "in whose immediate and individual behalf" the proceedings are wholly or in part had, within the meaning of the statute; and is therefore a competent witness to sustain the will. —*Lawyer v. Smith*, 411.

WRIT OF ERROR.

See ERROR, WRIT OF.

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